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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

NO. 7

LEON WOLFE, GEORGE SIMKINS, JR.
JOSEPH STURDIVENT, SAMUEL MURRAY,
and ELIJAH H. HERRING, Appellants

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 7

Leon Wolfe, George Simkins, Jr.,
Joseph Sturdivent, Samuel Murray, and Elijah H. Herring

Appellants

v

State of North Carolina

Appeal from the Supreme Court of the State of North Carolina

BRIEF ON THE MERITS

This Court having, on January 12, 1959, entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R 140), appellants file this Brief on the Merits pursuant to Rules 40 and 41 of the Revised Rules of this Court.

(a) Opinions in the Court Below

The Opinion of the Supreme Court of North Carolina delivered upon rendering the judgment here appealed from is reported in **State v Cooke et al., 248 NC 485, 103 SE 2d 846.** (R 107) That Court's Opinion upon a former trial upon another set of warrants charging the identical trespass upon the municipal Gillespie Park Golf Course is reported in **State v Cooke et al., 246 NC 518, 98 SE 2d 885.** (Page 55 of Appellants' Statement as to Jurisdiction)

(b) Grounds of Jurisdiction

This is a criminal prosecution commenced in the Municipal-County Court of Greensboro, North Carolina, alleging a

simple trespass by appellants upon the municipal Gillespie Park Golf Course. The warrants were issued under **Section 14-134 of the General Statutes of North Carolina (1953)**, which appellants contend is unconstitutional under the Federal Constitution as upheld and construed and applied in this case.

The Judgment of the Supreme Court of North Carolina appealed from was entered on June 4, 1958. (R 118) The sentence involved is 15 days in jail for each of appellants. (R 26-27)

No Petition for Rehearing in a criminal case is permitted in the Supreme Court of North Carolina. **State v Council, 129 NC 371 (511), 39 SE 814.** See also the Certificate of the Clerk of that Court. (R 139) Notice of Appeal to this Court was filed in the Supreme Court of North Carolina on August 27, 1958. (R 132) Appellants filed the Record and their Statement as to Jurisdiction and docketed the case in this Court on October 22, 1958, becoming No. 466 of the October Term, 1958.

Appellants believe that this Court has jurisdiction of this appeal under 28 USC 1257 (2). However, appellants have prayed in their Statement as to Jurisdiction and also in their Brief Opposing the Motion to Dismiss, and here renew that prayer, that if they should be mistaken in this belief, then that the appeal papers be treated as a Petition for Certiorari under 28 USC 2103 and that such Petition be granted.

(c) State Statute Involved

The validity under the Constitution of the United States of **Section 14-134 of the General Statutes of North Carolina (1953)**, as upheld and construed and applied by the State Courts to convict the appellants, is drawn in question upon this appeal, the Supreme Court of North Carolina having necessarily sustained said Statute's validity, said section reading:

> "If any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor and on conviction shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

(c) Provisions of U. S. Constitution Involved

The provisions of the Constitution of the United States which appellants contend are offended by the above-quoted State statute, as upheld and construed and applied in this case, are the following:

Article VI, Second Paragraph

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(d) Questions Presented by This Appeal

1. THE SUPREMACY CLAUSE QUESTIONS.

Is the State's criminal trespass statute (GS 14-134) unconstitutional "as applied"* in this case because:

(1) It seeks to implement the State's policy of making Gillespie Park Golf Course "a private club" (R 44, 75) in direct conflict with the policy of Federal law that this facility must provide "the greatest degree of public usefulness" (Manual of Rules and Regulations of W.P.A., Vol. II, Chap. 5, Page 1, Library of Congress Book No. HD 3881.A58)?

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*(See Raley v Ohio, ___US___, 3 L ed 2d 1344, 1353, ___S Ct___)

(2) It seeks to implement the State's effort to render ineffectual the agreement made by the State's agencies, City of Greensboro and Greensboro City Board of Education, with the United States, that during the useful life of this golf course it would be operated "for the use and benefit of the public" and would not "be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation"? (See Fact No. 4, infra, and Appendixes 1(a), 1(b), and 1(c), Pages 80-82.)

(3) It seeks to implement the State's effort to make a crime of identical acts and conduct which Federal Courts held to be protected by the Constitution of the United States, and make lawful acts of the State's agencies which the Federal Courts have held to have been "unlawfully" committed against the "constitutional rights" of the appellants? (R 92)

II. THE FOURTEENTH AMENDMENT QUESTIONS

Is the State's criminal trespass statute (GS 14-134) unconstitutional "as applied"* in this case:

A. Under the Equal Protection Clause:

(1) Because it seeks to implement and make good the practice of racial discrimination against appellants by the State's agencies, as shown:

(a) By the "facts" in the "published opinion" of the United States District Court for the Middle District of North Carolina, which the Supreme Court of North Carolina said in its opinion in this case were before the State courts (R 115)? (b) By the Declaratory Judgment which was alleged verbatim in the Motion To Set Aside the Verdict (R 92) and which allegation was not controverted by the appellee State in any way? (c) Within the "rule of exclusion" established by the decisions of this Court **(e.g. Hernandez v Texas, 347 US 475, 480, 98 L ed 866, 871, 74 S Ct 667)?**

(2) Because a "lack of standards" in the permission-granting authority to play Gillespie Park Golf Course constitutes

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***(See Raley v Ohio, __US__, 3 L ed 2d 1344, 1353, __S Ct__)**

"a denial of equal protection" without regard to racial discrimination, within the meaning of such cases as **Niemotko v Maryland, 340 US 268, 273, 95 L ed 267, 271, 71 S Ct 325?**

B. Under the Due Process Clause:

(1) Because it seeks to implement a denial of due process to appellants in this case:

(a) In that the State rules which closed the mouths to the truth of certain key witnesses in this case violate the standards of justice and fundamental fairness which the Due Process Clause of the Fourteenth Amendment requires of States in criminal prosecutions?

(b) In that the Supreme Court of North Carolina for the very first time held in this case that this criminal trespass statute **(GS 14-134)** applies also to public lands, and not just to lands **"privately held" (State v Clyburn, 247 NC 455, 458, 101 SE 2d 295),** and the judgment here thus sends each of the appellants **"to jail for a crime he could not with reasonable certainty know he was committing" (Scull v Virginia,__ US __; 3 L ed 2d 865, 871, 79 S Ct 838)?**

(c) In that the multiple criminal proceedings against appellants in this case reach areas which the Due Process Clause forbids, such as **"fundamental unfairness"** or **"unduly harassing an accused" (Hoag v New Jersey, 356 US 464, 467, 2 L ed 2d 913, 917, 78 S Ct 829),** or **"merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time"** (Concurring Opinion in **Brock v North Carolina, 344 US 424, 429, 97 L ed 456, 460, 73 S Ct 349)?**

III. THE QUESTION OF JUDICIAL NOTICE

Insofar as this question should become important in this case, appellants believe that it may cut across both the Question of Jurisdiction and the Case on the Merits. Therefore, this Question of Judicial Notice is given separate treatment.

The Question Is: What documents or facts which may become germane to a decision of this case come within the prin-

ciples under which this Court will take judicial notice of such documents and facts?

STATEMENT OF THE CASE

Under the Federal Emergency Relief Appropriation Act of 1939, 53 Stat 927, Ch 252, the appellee's agencies, City of Greensboro and Greensboro City Board of Education, made application for a WPA grant to build the golf course involved in this case. The grant of 65 per cent of the cost was made and the golf course was built, later becoming known as Gillespie Park Golf Course. (See Appendix 1 (a), Page 80 and Fact No. 4, infra, Page 13.)

As required by said Federal Act and its authorized regulations, appellee's said agencies agreed with the United States (1) that the golf course would be a public course, (2) that the City of Greensboro would maintain and operate the golf course during its useful life for the benefit of the public, and (3) that during the useful life of the golf course it would not be leased or otherwise disposed of to a private individual or corporation or to a quasi-public corporation. (See Fact No. 4 infra, Page 13.)

Appellee State's agency, City of Greensboro, describes the agreement with the United States Government on Pages 4, 7 and 8 of its "Brief and Appendix" on appeal to the United States Court of Appeals for the Fourth Circuit (No. 7450 on the Docket of that Court, filed May 14, 1957) and photographic reproductions of those pages are attached hereto as Appendix 1 (a), Appendix 1 (b), and Appendix 1 (c), respectively. The District Court's Finding of Fact No. 20 and Conclusion of Law No. 3, complained of by City of Greensboro on said pages, but affirmed by the Court of Appeals, read as follows (See pages 71, 76 of Appellants' Statement as to Jurisdiction.):

Finding of Fact No. 20: "On the 15th day of February, 1940, the defendant City of Greensboro and the defendant Greensboro City Board of Education entered into an agreement with the Government of the United States for the construction of a golf course on land, part of which was owned by the City of Greensboro and part by the Greensboro City Board

of Education, under which agreement the United States Government provided 65% of the cost of constructing said golf course. That in order to induce the United States Government to provide 65% of the cost, the defendants City of Greensboro and Greensboro City Board of Education agreed with the United States Government that (1) this golf course was 'for the use or benefit of the public.' (2) that the City of Greensboro would maintain and operate said golf course for the use and benefit of the public during the useful life of said golf course and (3) that said golf course would not 'be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation, during the useful life of' said golf course: Said golf course became known as the Gillespie Park Golf Course and is the golf course involved in this action."

Conclusion of Law No. 3: "The said agreement between the City of Greensboro, the Greensboro City Board of Education, and the United States Government imposed a duty upon the defendants in this case to maintain and operate the Gillespie Park Golf Course during its useful life for the benefit of public, including the Negro public, and that duty could not be voided by the execution of the leases involved in this case."

The Greensboro City Board of Education leased its interests to the City of Greensboro, and from the time the golf course was first opened until 1949 the City operated it exclusively for white citizens. (See Appendix 1 (a), Page 80, and Fact No. 2 infra, Page 13.)

When Negro citizens of Greensboro in 1949 became insistent upon their right to use the golf course, they were formally denied such right by resolutions of the Greensboro City Parks and Recreation Commission and the Greensboro City Council. (See infra, Page 61.) Thereupon, the Chairman of the City Parks and Recreation Commission, John R. Hughes, became the chief promoter of the organization of Gillespie Park Golf Club, Inc., and the prime negotiator of leases of the golf course from appellee's agencies, City of Greensboro and Greensboro City Board of Education to Gillespie Park Golf Club, Inc. (See infra, Page 62.) When City of Greensboro finally termi-

nated the leases, the City Council passed a resolution which recited: "Whereas, The Gillespie Park Golf Club, Inc., was created a non-profit, non-stock corporation and no person, other than the City, has invested any funds in the corporation or in the Golf Course and its equipment, and the Golf Club has operated solely on funds derived from the use of the Golf Course." (See Appendix 2 (g), Page 89.)

Subsequent to the making of the leases, the City of Greensboro built nine additional holes to the golf course, "which it had reserved the right to do under the lease," (See Appendix 1 (a), Page 80.) Apparently in an effort to comply with the "separate but equal" doctrine, the city built the 9-hole Nocho Park Golf Course for Negroes. (See Fact No. 3 infra, Page 13.)

On December 7, 1955, appellants sought permission to play Gillespie Park Golf Course by paying greens fees, as others were allowed, but were denied on the ground that "it was a private club for members and invited guests only" (R 44). Appellants placed the greens fees on the table and played without permission of the Assistant Golf Pro in charge. (See Facts No. 8 and No. 7 infra, Page 14.)

Appellants' conduct was entirely peaceful.—See testimony of State's witnesses: Deputy Sheriff Darby (R 49), Assistant Golf Pro Bass (R 43), and Golf Pro Edwards (R 45). Appellants were arrested upon warrants in Greensboro Municipal-County Court, charging criminal trespass under said statute, GS 14-134.

The warrants alleged a trespass upon property of "Gillespie Park Golf Course." Appellants were tried and convicted. Upon appeal to and trial de novo in the Superior Court of Guilford County, the proof showed the name of the corporation to be "Gillespie Park Golf Club, Inc." instead of as set out in the warrants, and amendment of the warrants accordingly was allowed by the trial court. Appellants were convicted and sentenced to 30 days in jail.

On appeal, the Supreme Court of North Carolina **on its own motion** found a "fatal variance" between the name of the corporation as alleged in the warrants and the name as shown

in the proof and amended warrants. Judgment was for this reason arrested by the State Supreme Court. 246 NC 518.

While the case upon the first set of warrants was pending on appeal in the Supreme Court of North Carolina, appellants brought suit in the United States District Court for the Middle District of North Carolina against appellee's agencies, City of Greensboro, Greensboro City Board of Education, and Gillespie Park Golf Club, Inc. (Civil Case No. 1058), seeking a declaration of the rights of the parties under the Federal Constitution with regard to the acts of appellants in playing golf on said golf course, for which they had been convicted and sentenced in the State court. (See Motion to Quash, R 32-33, and the Motion to Set Aside the Verdict, R 92)

After trial of the issues appellants prevailed, and the Federal District Court filed its Opinion, Findings of Fact, Conclusions of Law, and Declaratory Judgment, (See Pages 67-79, appellants' Statement as to Jurisdiction), which Judgment declared that appellee's said agencies had " . . . unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights . . ." (R 92) The Opinion of the Federal District Court is reported in **Simkins et al. v City of Greensboro et al., 149 Fed Supp 562.** The Court of Appeals for the Fourth Circuit affirmed in **City of Greensboro et al. v Simkins et al., 246 Fed 2d 425.** Certiorari was not sought in this Court.

After said affirmance by the Court of Appeals, appellee State caused indictments to be issued against appellants in the Superior Court of Guilford County, charging the same alleged trespass for the same alleged acts of playing golf. (R 36-42) When the indictments were called for trial on December 2, 1957, the appellee State took a Nol Pros with leave in all of the indictments. (R 43)

On the same day, December 2, 1957, appellee State caused appellants to be arrested upon a second set of warrants in the Greensboro Municipal-County Court, charging the same alleged trespass for the same acts of playing golf. (R 2-25)

These are the warrants upon which the appellants stand convicted and sentenced to 15 days in jail in this case.

Four of the warrants (R 2, 7, 10, 14) alleged the name of corporation to be "Gillespie Park Club, Inc.," and only two of the warrants (R 18, 22) alleged the name to be "Gillespie Park Golf Club, Inc." But this "fatal variance" which the Supreme Court of North Carolina noticed of its own motion in its first opinion (246 NC 518), was not noticed at all in the State Supreme Court's opinion directly involved on this appeal. (107-118)

In apt time appellants filed in the Municipal-County Court a Motion to Quash the warrants, alleging that they were "Negro citizens of Greensboro," and "that GS 14-134 is hereby being unconstitutionally applied to these defendants on the following grounds:"—setting out at some length appellants' contentions of violations of their rights under the Supremacy Clause and the 14th Amendment of the Constitution of the United States. (R 32-36) The motion was denied and appellants were tried and convicted. (See R 108)

Upon appeal to and trial de novo in the Superior Court of Guilford County, appellants in apt time renewed their Motion to Quash, which was denied. (See R 108)

During their voir dire examinations, those members of the jury who had played on Gillespie Park Golf Course "stated very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees." (R 93)

During the trial appellants sought on cross-examination of appellee's witnesses to show the practice of racial discrimination against Negroes in the operation of Gillespie Park Golf Course, but appellee State's objection was sustained to this type of question "as being immaterial." (R 45, 48)

Although John R. Hughes, President of Gillespie Park Golf Club, Inc., was present in court, appellee State rested its case without calling him as a witness. (R 50) When appellants sought to call him as an adverse witness, this request was denied. (R 72) Appellants then put the witness Hughes on the

stand and sought to prove his testimony before the United States District Court for the Middle District of North Carolina in the **Simkins Case, supra.** But Mr. Hughes said: "I did not testify for my association in the case of Simkins and others against City of Greensboro, Board of Education and Gillespie Park Golf Club, Inc."

Then counsel for appellants in the trial court said: "Q. Mr. Hughes, I hold in my hand a document purporting to be a transcript of the testimony in the case." (R 78) The objection of appellee State was sustained, and the mouth of the president of appellee's agency, whose employees were the prosecuting witnesses in this case, was closed against the truth which was elicited from him in the Federal District Court. That was in the presence of the Jury.

When the Jury had retired, the following took place, as appears on Page 79 of the Record:

"In the Absence of the Jury, Mr. John R. Hughes made the following statement to the Court:

"Mr. Hughes: If your Honor please, I would like to ask the Reporter to read the question and answer which I gave in my testimony, so that we may get the record straight.

"Question Read by Reporter as follows: 'Mr. Hughes, did you testify for your Association in the case of Simkins and others against the City of Greensboro, Board of Education, and Gillespie Park Golf Club, Inc.?'

"Mr. Hughes: In order that there may be no misunderstanding, I did testify in that case, but I was called as an adverse witness for the plaintiffs.

"Court: Do you wish to call Mr. Hughes back to the stand?

[1]"Mr. Marsh: No, your Honor."

Appellants were found guilty. Before they were sentenced

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[1]Under Napue v Illinois, ___US___, 3 L ed 2d 1217, 1221 ___S Ct___, it would appear that appellee's Solicitor in charge of the prosecution had "'the responsibility and duty to correct'" the wrong impression which the witness Hughes had given to the Jury.

appellants filed a Motion to Set Aside the Verdict (R 91-97), by reference making certain allegations of the Motion to Quash a part of the Motion to Set Aside the Verdict (R 91), including the allegation (R 32) "that GS 14-134 is hereby being unconstitutionally applied to these defendants," for the reasons under the Supremacy Clause and the 14th Amendment set out in the Motion to Quash.

Appellants also set out verbatim in the Motion to Set Aside the Verdict the Declaratory Judgment and Findings of Fact No. 33 and No. 30 of the Federal District Court in the **Simkins Case, supra,** (R 82, 94, 95-96), and in some detail alleged violations of the Supremacy Clause and the 14th Amendment under the facts and circumstances of the case. The Motion to Set Aside the Verdict was denied. (R 97) On appeal the Supreme Court of North Carolina upheld the trial court's denial of the Motion to Quash (R 110) and of the Motion to Set Aside the Verdict (R 118), and found "No Error" in any of the actions of the trial court. (R 118).

With reference to the Federal Court proceedings in the **Simkins Case,** the Supreme Court of North Carolina said in its Opinion in this case: **"Our knowledge of the facts in that case is limited to what appears in the published opinion."** (R 115) [2]Pertinent "Facts" in said "published Opinion" follow, being numbered for identification:

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[2]The consideration which this Court gives to "facts" set out in the Opinion of a United States District Court is indicated by the following quotation from the case of **Bibb v Navajo Freight Lines,** ___US___, 3 L ed 2d 1003, 1007, ___S Ct___:

> "Illinois introduced evidence seeking to establish that contour mudguards had a decided safety factor in that they prevented the throwing of debris into the faces of drivers of passing cars and into the windshields of a following vehicle. But the District Court **in its opinion stated** that it was 'conclusively shown that the contour mud flap possesses no advantages over the conventional or straight mud flap previously required in Illinois and presently required in most of the states,' (159 F Supp., at 388) and that 'there is rather convincing testimony that use of the contour flap creates hazards previously unknown to those using the highways.' Id. 159 F Supp at 390." (Emphasis added.)

"Facts" In Federal District Court's Opinion

Fact No. 1—"The City of Greensboro and the Greensboro City Board of Education concede that they cannot own and operate the Gillespie Park Golf Course for the public and exclude the plaintiffs and other Negro citizens of Greensboro from these privileges on account of their color." (149 Fed Supp 563).

Fact No. 2—"Although the golf course has been available to the public for many years, whether by design or otherwise, Negroes have been denied the enjoyment of the privilege." (149 Fed Supp 563).

Fact No. 3—"The City of Greensboro, befpre Brown v Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 256, in an effort to comply with Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, erected in the City of Greensboro a nine hole golf course for Negroes, known as Nocho Park Golf Course, but it cannot be deemed the equivalent of an 18 hole golf course like Gillespie Park course which was restricted to white people." (149 Fed Supp 563).

Fact No. 4—"The Board of Education leased the land it did not need for school purposes at the time to the City of Greensboro. Through Works Progress Administration, which furnished 65% of the cost, the City of Greensboro built the last nine holes and agreed not to sell or lease for private use this public property during its life of usefulness." (149 Fed Supp 563).

Fact No. 5—"Some of the Negro citizens applied to the City authorities for permission to play on the Gillespie Park Course in 1949 and, because of opposition on the part of local citizens against Negroes playing on the course, after some negotiation, the City of Greensboro and City Board of Education entered into a lease contract whereby the entire golf course was leased to Gillespie Park Golf Club, a non-profit corporation which was organized solely for the purpose of taking the lease and maintaining and operating the course as a public golf course. G.S. N.C. Sec. 55-11." (149 Fed Supp 563)

Fact No. 6—"It is true the directors met with a quorum at

first and fixed $60 for annual membership which permitted them to play without paying additional fees; also authorized $1 membership who would pay $1.25 greens fees on holidays and week-ends, and 75¢ on other days." (149 Fed Supp 563)

Fact No. 7—"The records of the corporation do not disclose sufficient data to show if rules were really established and enforced in respect to membership. The evidence does clearly show that white people were allowed to play by paying the greens fees without any questions and without being members. When Negroes asked to play, they were told they would have to be members before they could play and it clearly appears that there was no intention of permitting a Negro to be a member or to allow him to play, solely because of his being a Negro." (149 Fed Supp 563)

Fact No. 8—"The six plaintiffs presented themselves at the desk of the man in charge of the golf course and laid down 75¢ each and asked to play, the first named plaintiff being a dentist practicing his profession in Greensboro. But they were not given permission to play. They insisted on their right to play and played three holes. While playing the third hole, the manager came and ordered them to leave and they refused to go unless an officer arrested them. Whereupon the manager swore out a warrant charging each with trespass upon which they were tried, convicted and sentenced to 30 days in jail, the statutory limit, from which an appeal is pending in the Supreme Court of North Carolina." (149 Fed Supp 563).

Fact No. 9—"The Negroes have not only been denied the privilege of the golf course but there is no intention on the part of the defendants to permit them to do so unless they are compelled by order of court." (149 Fed Supp 563).

Fact No. 10—"The brief filed by the City of Greensboro contains this significant statement in its statement of facts: 'In December, 1955, six of ten plaintiffs in this action were denied the use of Gillespie Park Golf Course by employees of Gillespie Park Golf Club, Inc. That same month the City Council instructed the City Manager to proceed forthwith to receive bids for the sale of Gillespie Park Course and upon such sale to close the Nocho Park course. The land upon which the latter

is situated is to be used for governmental purposes and is not to be sold.' The facts show that the city is still 'in the saddle' so far as real control of the park is concerned and that the so-called lease can be disregarded if and when the City decides to do it. It also lends powerful weight to the inference that the lease was resorted to in the first instance to evade the city's duty not to discriminate against any of its citizens in the enjoyment in the use of the park." (149 Fed Supp 565).

Fact No. 11—"This golf club permits white people to play without being members, or otherwise, except it requires the prepayment of greens fees. The plaintiffs here paid their fees, were forced off the course by being arrested for trespass. Everybody knows this was done because the plaintiffs were Negroes and for no other reason. This court cannot ignore it." (149 Fed Supp 565).

Fact No. 12—"A decree will be entered declaring that these plaintiffs have been denied on account of their color equal privileges to use the golf course owned by the City Board of Education and the City of Greensboro and operated by the Gillespie Park Golf Club, and permanently restraining the defendants from discriminating against plaintiffs and other members of their race on account of color, so long as the golf course is owned by these agencies and operated for the pleasure and health of the public, their agents, lessees, servants and employees. The court invited counsel for the respective parties to confer and to suggest to the court the best practical way to make effective the decree, in the event the plaintiffs prevailed. The final decree will be deferred a short time to get the result of this conference." (149 Fed Supp 565).

Matters of Common or General Knowledge

There are some matters of common or general knowledge in this case. They include the policy of racial exclusion of Negroes from this golf course over the years of its operation, as stated by Judge Hayes in Fact No. 2 and also in Fact No. 11, supra, when he said of the exclusion of appellants: "Everybody knows this was done because the plaintiffs [appellants here] were Negroes and for no other reason. This court cannot ig-

nore it." They also include the continued **"in-the-saddle"** connection with the golf course of appellee's State agency, City of Greensboro, as stated by Judge Hayes in Fact No. 10, supra.

As substantiating matters of common or general knowledge pertinent to the issues involved in this case, appellants attach hereto photographic reproductions of newspaper clippings, marked Appendixes 2 (a) to 2 (f) inclusive, and a photographic reproduction of Page 190 of Minute Book No. 31 of the Minutes of the City Council of the City of Greensboro, North Carolina, marked Appendix 2 (g).

SUMMARY OF ARGUMENT

The following is a Summary of the Argument for appellants:

A. ON THE QUESTION OF JURISDICTION

Appellants contend that Federal Questions involved were raised in written Motions to Quash and to Set Aside the Verdict before the trial court, that appellee State did not answer to deny or controvert any of the allegations of these Motions, that under both State and Federal law these allegations should have been taken as true, that the trial court denied these Motions and this denial was sustained by the Supreme Court of North Carolina.

Appellants contend that the Opinion of the Supreme Court of North Carolina in this case shows that the Motions which raised Federal Questions were denied on the merits, and not on any ground of local procedure or practice. In this connection appellants contend that the Opinion of the Supreme Court of North Carolina said in so many words that the State Court was "considering the merits" of the case.

Appellants contend that, since Federal Questions were raised in pleadings, under the decisions of this Court this Court will decide for itself whether these Federal Questions were well taken and this Court is not concluded by what the State courts have decided with regard to these pleadings.

Appellants also contend that the North Carolina Supreme

Court's Opinion and judgment themselves deny to appellants Federal constitutional rights, and that this denial could not be called to the attention of the Supreme Court of North Carolina, because no petition for rehearing is permitted in a criminal case in that court.

Appellants contend that this Court has jurisdiction on appeal under 28 USC 1257 (2), because the written Motions before the State courts alleged that the North Carolina criminal trespass statute which is involved (GS 14-134), as construed and applied in this case, violates the Supremacy Clause and the 14th Amendment of the Constitution of the United States, and that the decisions of the State courts were necessarily in favor of the validity of this criminal trespass statute as construed and applied in this case.

Appellants contend that this Court has jurisdiction (1) to examine the record to determine for itself whether racial discrimination in the use of the public golf course involved is shown within the meaning of the decisions of this Court; (2) to determine whether the record shows a denial of equal protection without regard to racial discrimination; (3) to determine whether the fundamental fairness required by the Due Process Clause has been denied to appellants in the trial of this case; (4) to determine whether or not the State Supreme Court's judgment violates the agreement made by the State's agencies with the United States covering the use of this golf course, or whether the policy of the State law and the State court's judgment collide with Federal law and regulations concerning this golf course; (5) to protect and effectuate the Declaratory Judgment of the Federal Courts with regard to this golf course.

Appellants also point to the similarity between the instant case on the Question of Jurisdiction on appeal and certain recent decisions of this Court taking jurisdiction on appeal.

However, appellants have prayed that, if they should be mistaken in their belief that this Court has jurisdiction on appeal under 28 USC 1257 (2), that then the appeal papers be treated as a Petition for Certiorari and that such Petition be granted under 28 USC 2103.

B. ON THE MERITS

(1) Under the Supremacy Clause:

Appellants contend that the State's criminal trespass statute (GS 14-134), as applied in this case, and the State Supreme Court's judgment enforcing said statute violate the Supremacy Clause in three particulars:

(a) They implement a policy which made Gillespie Park Golf Course "a private club for members and invited guests only," directly in conflict with an applicable Federal statute and its supporting regulations which require that this golf course "offer the greatest degree of public usefulness."

(b) They implement a policy violating an agreement by the State's agencies with the United States that this golf course would be operated for the benefit of the public and would not "be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation" during the useful life of said golf course.

(c) They implement a policy directly in conflict with a Federal District Court's Declaratory Judgment in Simkins et al. v City of Greensboro et al., 149 Fed Supp 562, as affirmed by the Court of Appeals for the Fourth Circuit.

(2) Under the Fourteenth Amendment:

(a) Denial of Equal Protection.

Appellants contend that they have been denied the equal protection of the laws in this case because (1) They were denied the use of Gillespie Park Golf Course because of race or color, and (2) The record shows a denial of equal protection because of a "lack of standards" in the permission-granting authority for use of the golf course.

(b) Denial of Due Process of Law.

Appellants contend that they have been denied due process of law in this case in that (1) In the trial of this case the State closed the mouths of certain key witnesses to the truth, so that evidence material to appellants' defense was suppressed by the State's rules of evidence. (2) The Supreme Court

of North Carolina in this case for the first time held the criminal trespass statute applied to the public lands of this golf course, and not just to lands "privately held," as the State Supreme Court had theretofore always held, and that appellants therefore could not know "with reasonable certainty" that they were violating this statute by playing on this public golf course. (3) In this case three original, successive criminal proceedings have been prosecuted by the State against appellants in such a way as to amount to fundamental unfairness as forbidden by the Due Process Clause of the 14th Amendment.

C. THE QUESTION OF JUDICIAL NOTICE

Appellants treat the question of Judicial Notice separately because, insofar as this question may become important in this case, appellants believe that it may cut across both the Question of Jurisdiction and The Case on the Merits.

Appellants take the position that the decisions of this Court on the Question of Judicial Notice, as well as the reasonable bases of judicial notice, would require that judicial notice be taken of any necessary documents or facts which were not before the State courts as a matter of uncontroverted pleading or otherwise.

ARGUMENT I

The Question of Jurisdiction

(a) Raising of Federal Questions Below—

The Federal questions were first raised by appellants in the trial court by a Motion to Quash the warrants (R 32), and then by a Motion to Set Aside the Verdict (R 91), the latter incorporating certain allegations of the former by reference.

In both motions it was alleged that the North Carolina criminal trespass statute (GS 14-134), under which appellants stand convicted, was "being unconstitutionally applied" to appellants in that, among other things:

"The State of North Carolina in this prosecution is, contrary to the Supremacy Clause of the United States Constitu-

tion, attempting to make a crime out of specific acts and conduct which both the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth Circuit have specifically held to be protected by the Fourteenth Amendment to the Constitution of the United States." (R 32, 92)

Both motions also alleged:

"To permit this prosecution to proceed would be in effect to nullify and render ineffectual the judgment and decree of the United States Courts, contrary to the Supremacy Clause of the United States Constitution and such prosecution would violate the rights of these defendants and laws of the United States, including the Fourteenth Amendment." (R 34, 92)

Both motions further alleged:

"Based upon the specific facts and conduct alleged by the State to be a crime in this case, these defendants brought Civil Action No. 1058 in the United States District Court for the Middle District of North Carolina, praying for a declaratory judgment and a decree enjoining the prosecution witnesses and the city of Greensboro and the Greensboro City Board of Education from interfering with the defendants and all other Negroes similarly situated from playing golf on the Gillespie Park Golf Course.

"A full hearing was held before United States District Judge Johnson J. Hayes, who on April 24, 1957, found specifically that the prosecuting witnesses and the City of Greensboro had refused to permit these defendants to play golf 'primarily because of their color' (Finding of Fact No. 33), and concluded as a matter of law that these defendants 'and other Negroes similarly situated cannot be denied on account of race, the equal privileges to the park, notwithstanding the lease.' " (R 33, 92)

Both motions further alleged:

"These defendants have subpoenaed the Clerk of the United States District Court for the Middle District of North Carolina to bring to this trial the full record and judgment roll

in said case and respectfully request an opportunity to offer this evidence upon the hearing of this motion.

"Defendants respectfully urge the Court to receive and consider the record and judgment roll in the Federal case and after such consideration to estop the State and the prosecuting witnesses from proceeding further with this prosecution." (R 33, 92)

Both motions alleged the former trial upon the first set of warrants and the indictments in the Superior Court, and alleged that the trial upon the second set of warrants amounted to double jeopardy in violation of the Federal Constitution. (R 34-35, 92).

The Motion to Set Aside the Verdict alleged:

"That the Supremacy Clause (Article VI) of the Constitution of the United States requires this Court to give effect to and to enforce the judgments of the United States Courts covering the subject matter of this prosecution, particularly the 'Decree and Injunction' of the United States District Court for the Middle District of North Carolina, in Civil Case No. 1058, in which these defendants were plaintiffs and Gillespie Park Golf Club, Inc., was one of the defendants, covering the identical acts and conduct charged by the State to be a crime of trespass in this case, said 'Decree and Injunction' reading in part as follows:

" 'It is now ordered, adjudged and decreed that defendants HAVE UNLAWFULLY DENIED THE PLAINTIFFS as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, AND THAT THIS WAS DONE SOLELY BECAUSE OF THE RACE AND COLOR OF THE PLAINTIFFS, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similiarly situated.' (Emphasis added.)

"That the State of North Carolina and its jury in this case undertake to find to be criminal the identical acts and conduct whch said 'Decree and Injunction' holds to be protected by the Constitution of the United States, and further undertake to find to have been lawfully done, that which said 'Decree

and Injunction' holds was 'unlawfully' done, and that to permit said verdict to stand and to punish these defendants on the basis of said verdict would nullify and render ineffectual the rights of these defendants which said 'decree and injunction' holds to be guaranteed and protected by the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment." (R 92)

Said Motion to Set Aside the Verdict quoted Fact No. 11, supra, page 15, from the Opinion of Judge Hayes, and followed with this request of the trial Court:

"Defendants respectfully request this Court to take judicial notice of this matter of common knowledge pertaining to this public golf course owned and operated by their agency by the City of Greensboro and the Greensboro City Board of Education. That this matter of common knowledge about the Gillespie Park Golf Course was spoken truly and not idly by Judge Hayes when he wrote that 'everybody knows' it, was shown by Jurors in this case in their answers to questions touching their qualifications. Those who had played on Gillespie Park Golf Course stated very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees. Defendants respectfully suggest that, if any confirmation of Judge Hayes' statement that this was common knowledge which 'everybody knows' is necessary it is found in these statements of the Jurors in this case." (R 93)

The Motion to Set Aside the Verdict also alleged:

"Defendants respectfully suggest to the Court that to permit this verdict to stand under these circumstances would violate the rights of these defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment." (R 93)

The Motion to Set Aside the Verdict also alleged:

"That said 'Decree and Injunction' of the United States District Court for the Middle District of North Carolina begins as follows: 'This cause coming on for hearing and the Court having heard the evidence and argument of counsel and carefully considered the same and the briefs filed, and having

made the findings of fact and conclusions of law which appear of record.'

"Defendants respectfully suggest to the Court that this reference in said 'Decree and Injunction' to the findings of fact and conclusions of law which appear of record makes them a part of the 'Decree and Injunction' just as if written out therein in full; and for this reason and also because said findings of fact and conclusions of law are a part of the record and judgment roll in said case in the United States District Court for the Middle District of North Carolina covering the identical acts and conduct which said verdict seeks to make a crime, the Supremacy Clause of the Constitution of the United States lays a duty upon this Court to respect and give effect to said findings of fact and conclusions of law, and especially to Finding of Fact 33, which reads as follows:

" 'White citizens of Greensboro are given the privilege of becoming permanent members by paying $60.00 per year without greens fees and others not permanent members by paying $1.00 per year and greens fees of $.75, except on holidays and weekends, when it is more. On days other than holidays and weekends when greens fees are $1.25 white citizens are permitted to play without being members by paying the fees above set forth and without paying the extra $1.00 and without any questions being put to them. When the plaintiffs applied to be given the same privilege they were refused on the ground that they were not members but primarily because of their color. Plaintiffs laid the greens fees on the table in the club house, went out to play and after they had gotten to the 3rd hole the 'pro' in charge of the golf course ordered them off and they insisted they had a right to play and would not get off unless they were arrested by an officer, whereupon the 'pro' had them arrested and they were tried and convicted and sentenced to imprisonment for a period of 30 days, which is the maximum under the law for the State of North Carolina for trespassing.' " (R 93-94)

The Motion to Set Aside the Verdict also alleged:

"That the evidence in this case and the instructions of the Court to the Jury show that the land on which Gillespie Park

Golf Course is situated is public and not private property, whereas GS 14-134, which is the North Carolina statute under which the warrants were drawn in this case, is meant to cover private property and not public property." (R 95)

"Defendants respectfully suggest to the Court that this statute was never intended to apply to public lands or public property, but was and is intended to apply solely and only to private property, and that the lands and property and the possession alleged to have been invaded in this case was public lands and property and the possession of an agency of the City of Greensboro and the Greensboro City Board of Education, which held the title to said lands and property. In this connection, defendants respectfully call the Court's attention to Finding of Fact No. 30 in said case in the United States District Court for the Middle District of North Carolina:

" 'That the leases in this case undertook to turn over to a corporation having no assets or income highly valuable income-producing property belonging to the City and the school board, the chief officer and promoter of said corporation being an official of the city, and the city having no prospect of getting anything from said leases except out of the income which the leased property was already bringing in, and with the City reserving the right to put into the property further investments from other sources than said income and that under these circumstances said corporation was in fact an agency of the City and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro.' " (R 95-96)

The Motion to Set Aside the Verdict also alleged:

"Defendants further suggest to the Court that as citizens and taxpayers of the City of Greensboro, these defendants along with all other such citizens and taxpayers did have a license to go upon said lands upon which said Golf Course was situated, and that there is no evidence whatsoever in this case that these defendants were 'without a license' to go upon or to remain upon said lands, and that the absence of such a license is an indispensable ingredient of the trespass established by GS 14-134." (R 96)

THE APPELLEE STATE DID NOT ANSWER OR DENY OR CONTROVERT THE MOTION TO QUASH OR THE MOTION TO SET ASIDE THE VERDICT, OR ANY OF THE ALLEGATIONS CONTAINED IN EITHER MOTION.

The rule of pleading in North Carolina, both by statute and also by decisions, is that where the allegations of a pleading are not answered or denied, the facts alleged must be taken as true. **GS 1-159. Bonham v Craig, 80 NC 224, 227.**

Immediately after Section 1-159 of the official edition of the General Statutes of North Carolina (1953) is the following: **"Editor's Note.—The rule established by this section disposed of the necessity of submitting to the jury matters which the law deems as admitted in the absence of denial."**

The same rule applies in the decisions of this Court as to allegations concerning Federal rights, which are not answered or denied. **Tomkins v Missouri, 323 US 485, 89 L ed 407, 65 S Ct 370.**

(b) Actions of Courts Below on Motions to Quash and to Set Aside the Verdict—

The trial Court denied the Motion to Quash, the North Carolina Supreme Court putting it this way: **"Before pleading to the merits in the Superior Court, defendants renewed their motions to quash as originally made in the Municipal-County Court. The motions made in apt time were overruled by the court." (R 108)**

In sustaining this action of the trial Court, the Supreme Court of North Carolina said: **"Since none of the reasons nor all combined sufficed to sustain the motion to quash,** the court correctly overruled the motion and put defendants on trial for the offense with which they were charged." (R 110)—(Emphasis added.) It is clear to appellants that since the allegations of the Motion to Quash were not answered or denied and thus must be taken as true, the decision of the North Carolina Supreme Court amounts to a holding that the motion did not contain allegations sufficient to constitute a defense, under the Constitution and laws of the United States, to the criminal trespass prosecution.

As to the Motion to Set Aside the Verdict, this too was denied by the trial Court (R 97), and in sustaining this action the Supreme Court of North Carolina said: **"Defendants were not, as a matter of right, entitled to have the verdict set aside."** (R 118) Since the allegations of the Motion to Set Aside the Verdict were not answered or denied, it is likewise clear to appellants that this action of the North Carolina Supreme Court amounts to a holding that the motion did not contain allegations sufficient to constitute a defense, under the Constitution and laws of the United States, to the criminal trespass prosecution.

With regard to the question of Double Jeopardy, the Supreme Court of North Carolina said: **"It is manifest there is here no double jeopardy."** Appellants believe that this is a clear decision of this question on the merits.

(c) Decisions of this Court Regarding Federal Questions Raised in Pleadings—

The general rule was restated in the case of **Staub v City of Baxley, 355 US 313, 318, 2 L ed 2d 302, 309, 78 S Ct 277:**

> **"'Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.' First Nat. Bank v Anderson, 269 US 341, 346, 70 L ed 295, 302, 46 S Ct 135, and cases cited. See also Schuylkill Trust Co. v Pennsylvania, 296 US 113, 122, 123, 80 L ed 91, 98, 56 S Ct 31, and Lovell v Griffin, 303 US 444, 450, 82, L ed 949, 952, 58 S Ct 666. As Mr. Justice Holmes said in Davis v Wechsler, 263 US 22, 24, 68 L ed 143, 145, 44 S Ct 13, 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Whether the constitutional rights asserted by the appellant were ' . . . given**

due recognition by the [Court of Appeals] is a question as to which the [appellant is] entitled to invoke our judgment, and this [she has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . [for] if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.' Ward v Love County, 253 US 17, 22, 64 L ed 751, 758, 40 S Ct 419, and cases cited."

See also Allied Stores of Ohio v Bowers, ____US____, 3 L ed 2d 480, 483, 79 S Ct 437, where it is stated that this principle now "is settled."

In Brown v Western Railway of Alabama, 338 US 294, 295, 296, 94 L ed 100, 102, 103, 70 S Ct 105, a demurrer was sustained to a complaint asserting Federal rights, and the cause dismissed by the state courts. On certiorari, this Court said of the conclusions of the Georgia Court of Appeals regarding the complaint:

"The court reached the foregoing conclusions by following a Georgia rule of practice to construe pleading allegations 'most strongly against the pleader.' "

"It is contended that this construction of the complaint is binding on us. The argument is that while state courts are without power to detract from 'substantive rights' granted by Congress in FELA cases, they are free to follow their own rules of 'practice' and 'procedure.' To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which respondent relies. Central Vermont R. Co. v. White, 238 US 507, 59 L ed 1433, 35 S Ct 865, Ann Cas 1916B 252, 9 NCCA 265. Other cases in this Court point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure.' Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we

see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice . . . And we cannot accept as final a state court's interpretation of allegations in a complaint asserting it."

"Second. We hold that the allegations of the complaint do set forth a cause of action which should not have been dismissed."

(d) Jurisdiction to Examine the Record to Determine Whether or Not It Shows Racial Discrimination in This Case—

The appellee made quite a point in its Motion to Dismiss that "The Question of Racial Discrimination in the Use of the Golf Course Was Not Involved in This Case."

The jurisdiction of this Court to make such an examination of the record in connection with appellants' assertion of this Federal right seems to be well established. In **Niemotko v Maryland, 340 US 268, 271, 95 L ed 267, 270, 71 S Ct 325,** this Court said:

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."[3]

In **Ashcraft v Tennessee, 322 US 143, 88 L ed 1192, 64 S Ct 921,** Headnote No. 1 in 88 L ed reads:

"Where the claim is made of denial of due process in a state court by obtaining a conviction through use of a

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[3]Regarding this same quotation from **Niemotko v Maryland,** this Court in **Napue v Illinois, supra (3 L ed 2d at 1222),** said that: "It is now so well settled that the Court was able to speak in Kern-Limerick, Inc. v Scurlock, 347 US 110, 121, 98 L ed 546, 556, 74 S Ct 403, of the 'long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself **facts or constructions** upon which federal constitutional issues rest." (Emphasis added.)

confession procured by coercion, the Supreme Court of the United States is bound to make an independent examination of the record to determine the validity of the claim, and **the performance of this duty cannot be foreclosed by the finding of a court or the verdict of a jury, or both."** (Emphasis added.)

(e) Jurisdiction to Determine the Validity of the Criminal Trespass Statute as Applied in This Case to Impose Criminal Punishment upon Appellants for Exercising Their "Constitutional Rights" to Play Golf, as Upheld by the Federal Courts.

A similar jurisdictional question arose in **Marsh v Alabama, 326 US 501, 502, 90 L ed 265, 266, 66 S Ct 276.** The Court stated the question as follows:

"In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management."

This Court continued (326 US 504): **"Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because the title to the sidewalk was in the corporation and because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public . . . The State Supreme Court denied certiorari . . . and the case is here on appeal . . ."**

The **Marsh Case** is particularly pertinent to this case, so far as jurisdiction is concerned, because the state statute carrying the criminal sanctions was a criminal trespass statute almost identical with the statute which appellants allege to be unconstitutional as applied in this case. **This Court held that it had jurisdiction "on appeal."**

(f) Jurisdiction to Determine the Question of Equal Protection in This Case Without Regard to the Question of Racial Discrimination—

In the **Niemotko** case, supra, appellants were arrested for using a public park without permission and convicted for violating a disorderly conduct statute, which was challenged by appellants as violating their constitutional rights. Despite the jury's verdict of guilty and the rules of "practice" and "procedure" as determined by the state courts, this Court held that it had jurisdiction to review the Federal questions, saying: **"Being of opinion that the case presented substantial constitutional issues, we noted probable jurisdiction, the appeal being properly here under 28 USC 1257 (2)."** (340 US 270)

(g) Jurisdiction to Determine the Question of Due Process in This Case Concerning Appellants' Charges of "Fundamental Unfairness"—

(1) Appellants submit that the question of "fundamental unfairness" arises in connection with the testimony of the witness, John R. Hughes, president of the Gillespie Park Golf Club, Inc., and other witnesses. This is the witness who told the Jury: "I did not testify for my association in the case of Simkins and others against the City of Greensboro, Board of Education and Gillespie Park Golf Club, Inc." (R 77), but who in the absence of the jury asked and received permission to dictate this statement into the record: "In order that there may be no misunderstanding, I did testify in that case, but I was called as an adverse witness for the plaintiffs." (R 79)

In connection with the testimony of this very important witness, these appellants believe that it is quite significant that Federal Judge Hayes in the **Simkins Case** devoted several Findings of Fact to the activities of this witness (See Pages 72-74 of Statement as to Jurisdiction in this case.), one of which Findings of Fact (No. 26), with regard to the negotiations by which the leases were made to the golf corporation, said: ". . . at all times involved in these negotiations, the said John R. Hughes was Chairman of the Greensboro Parks and Recreation Commission."

(2) Appellants respectfully suggest that in this case the Supreme Court of North Carolina changed its long-standing rule that the criminal trespass statute involved in this case (GS 14-134) applied only to land "**privately held,**" to hold that it also applied to the **public lands** of Gillespie Park Golf Course, and that this question is a substantial one and gives this Court jurisdiction to determine whether or not the "reasonable certainty" which fundamental fairness requires of state criminal statutes was present in this case, within the meaning of such cases as **Scull v Virginia, supra.** Since no petition for rehearing was permissible, this change could not be called to the attention of the State Supreme Court.

(3) These claims are also made in regard to appellants' allegations of double jeopardy through the multiple criminal proceedings against them for the same alleged trespass upon Gillespie Park Golf Course.

In **Hoag v New Jersey, 356 US 464, 2 L ed 2d 913, 78 S Ct 829,** this Court held that it had jurisdiction on certiorari to review the claim of double jeopardy, stating the general rule to be with regard to multiple criminal proceedings: "**The question in any given case is whether such a course has led to fundamental unfairness.**" The Court also said: "**The question is whether this case involved an attempt 'to wear the accused out by a multitude of cases with accumulated trials.'**" (356 US 467)

On the question of fundamental unfairness in multiple criminal proceedings, Mr. Justice Frankfurter, concurring in **Brock v North Carolina, 344 US 424, 429, 97 L ed 456, 460, 73 S Ct 349,** said:

> "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused **merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time.**" **(Emphasis added.)**

All of these questions of unfairness with regard to the multiple criminal proceedings against these appellants for

playing golf on this public golf course are involved in this case, and appellants believe that, under the rules announced in the above cases, this Court has jurisdiction to hear them.

(h) Jurisdiction to Determine the Effect of the Agreement Made by Appellee's State Agencies with the United States Concerning Gillespie Park Golf Course—

Judge Hayes' Opinion in the **Simkins Case,** which the North Carolina Supreme Court said was before the State Courts, shows that Gillespie Park Golf Course was originally built pursuant to an agreement between appellee State's agencies, City of Greensboro and Greensboro City Board of Education on the one hand, and the Government of the United States on the other hand. (See Fact No. 4, supra).

(i) Jurisdiction to Protect or Effectuate Judgments of the Federal Courts—

Under **28 USC 2283** the jurisdiction of Federal Courts to "protect or effectuate" their judgments is not only recognized, but that jurisdiction is recognized to the extent that it becomes one of the rare cases meeting "the severe restrictions" of that statute's limitations upon the jurisdiction of Courts of the United States "to stay proceedings in a State court." See **Leiter Minerals, Inc. v United States, 352 US 220, 226, 1 L ed 2d 267, 273, 77 S Ct 287.** Also **Cf Capital Service, Inc. v National Labor Relations Board, 347 US 501, 98 L ed 887, 74 S Ct 699.**

That the United States District Court for the Middle District of North Carolina and the Court of Appeals for the Fourth Circuit would have jurisdiction by injunction to "protect or effectuate" their judgment in the **Simkins** case would seem to be clear. **Bland Lumber Co. v National Labor Relations Board, 177 Fed 2d 555; Jacksonville Blow Pipe Co. v Reconstruction Finance Corporation, 244 Fed 2d 394; Jackson v Carter Oil Co., 179 Fed 2d 524.** In **Jacksonville Blow Pipe** it was said (244 Fed 2d at 400):

> **"Finally, viewing only the statute in the abstract, the district court's action here appears to be clearly covered by the authority 'to protect or effectuate its judgments,' since all that is sought in the state litigation is to change the**

manifest effect of the actions and orders of the court appointed trustee, of the Referee, and of the court itself in approving the Bill of Sale including the blow pipe system; nothing would be as productive of friction between the state and the federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court."

State Court's Frustration of Federal Court's Judgment at Little Rock Enjoined.

Appellants think **Thomason v Cooper, 254 Fed 2d 808** in principle is practically on all-fours with the instant case. In **Thomason** an Arkansas Chancery Court at Little Rock issued an order "restraining the school board from requiring petitioner's child or any other white child from enrolling in and attending a school where both white and Negro children are enrolled and from enrolling Negro children in schools subject to the jurisdiction of Little Rock School Board which had been maintained exclusively for white children." (See 254 Fed 2d at 809-810.)

The Court of Appeals for the Eighth Circuit quoted in full **28 USC 2283**, which gives jurisdiction to and authorizes a Federal Court to enjoin state court proceedings in order "to protect or effectuate its judgments." Then, affirming the District Court's order enjoining proceedings under the state court's injunction, the Court of Appeals (254 Fed 2d at 810) said:

> "Obviously, the decree of the state Chancery Court was in direct conflict with the judgment and decree of the federal District Court and of this Court affirming that judgment and decree."
>
> "The federal District Court was certainly not required to permit the decree of the state court to frustrate the judgment and decree of the federal court approving and effectuating the plan of the School Board for the gradual integration of the schools."

The only difference which appellants see between **Thomason v Cooper** and the instant case is that in **Thomason** a state Chancery Court's injunction was used to attempt to frustrate

the judgment and decree of the Federal Courts, whereas in the instant case a state criminal court's warrant is used for this purpose.

The teaching of such cases as **Angel v Bullington, 330 US 183, 91 L ed 832, 67 S Ct 657,** as appellants believe, is that this Court, being **"a higher court . . . for an authoritative adjudication of the federal questions involved,"** (330 US 187) has the same jurisdiction with regard to the Federal questions as a lower Federal Court would have, if the action had been originally brought in the Federal Courts. This Court also said (330 US 188, 189):

> **"Here, claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure. But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. That Court could not put a federal claim aside, as though it were not in litigation, by the talismanic word 'jurisdiction.' When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide."**

It was held that failure to seek to have the federal claims reviewed by the Supreme Court of the United States after a final judgment in the Supreme Court of North Carolina, made the decision of the North Carolina Supreme Court conclusive by res judicata of the federal claims and federal rights involved, and that these federal claims and rights could not be asserted by an original action in the Federal Courts. Appellants believe that the clear implication of this is that this Court, in reviewing Federal rights and claims asserted in the state courts, has the jurisdiction and power to give all necessary relief to "protect or effectuate" those Federal rights and claims which the lower Federal Courts would have had, if the action had been originally commenced there.

Similarity to Frank v Maryland On Question of Jurisdiction

An examination of the Transcript of Record in **Frank v Maryland (Decided May 4, 1959), —US—, 3 L ed 2d 877, 79 S Ct 804,** shows great similarity with the instant case, so far as the question of jurisdiction is concerned.

In **Frank** appellant was first tried upon a warrant charging violation of a nuisance ordinance before a magistrate in Baltimore Police Court and, over challenge of the ordinance on constitutional grounds, Frank was found guilty and fined $20.00. On appeal to the Criminal Court of Baltimore and a trial de novo, Frank was again found guilty and fined $20.00.

Appellant in **Frank** raised his constitutional objections to the ordinance (Frank Record 27) by a "Motion to Dismiss" (similar to the Motion to Quash in the instant case) on the ground that the ordinance under which he was charged violated the Constitution of Maryland and "the Fourth and Fourteenth Amendments to the Constitution of the United States."

The Motion to Dismiss in **Frank** was "Denied" without opinion by the trial judge.

After all of the evidence was in, the appellant in **Frank** (R 40) filed a "Motion for Verdict of 'Not Guilty' " (similar to the Motion to Set Aside the Verdict in the instant case—which is a proper pleading under North Carolina law, **State v Godwin, 5 Iredell 401, State v Best, 111 NC 638, 643, 15 SE 930),** setting out substantially the same constitutional grounds as in the Motion to Dismiss.

The Motion for Verdict of "Not Guilty" in Frank was also "Denied" without opinion by the trial judge.

The Court of Appeals of Maryland in **Frank** denied appellant's "Petition for Certiorari to the Criminal Court of Baltimore" without opinion and without any docket entries (Frank Record 43, 44.)

While the Supreme Court of North Carolina wrote an opinion in the instant case, it sustained the actions of the trial Judge in his denial without opinion of the Motion to Quash and the Motion to Set Aside the Verdict, which raised the con-

stitutional questions in the instant case much more extensively than constitutional questions were raised in the Motion to Dismiss and the Motion for Verdict of "Not Guilty" in the **Frank Case.**

State Supreme Court Said It Was "Considering the Merits"

At the outset of its opinion in the instant case, the Supreme Court of North Carolina said:

> "Before pleading to the merits in the Superior Court, defendants renewed their motions to quash as originally made in the Municipal-County Court. The motions made in apt time were overruled by the court.
>
> **"Before considering the merits of the cases,** we must ascertain if defendants were properly called upon to answer the criminal charges leveled against them. The motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina.
>
> "S. v Cooke, 246 NC 518, 98 SE 2d 885, is relied upon for two of the reasons assigned. An examination of that case is necessary **to assay the merits of the motions."** (Emphasis added—R 108)

Of course, this Court is not bound by the statement of the North Carolina Supreme Court that "the motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina." Under **Staub v City of Baxley, Allied Stores of Ohio v Bowers, and Brown v Western Railway of Alabama, supra,** "this Court must determine for itself" what the allegations and reasons were in the Motion to Quash and their sufficiency to constitute a defense under the Federal Constitution and laws.

Similarity to Irvin v Dowd

The Supreme Court of North Carolina having written that it was **"considering the merits of the cases"** and that it was about **"to assay the merits of the motions"** to quash ap-

pellee State's claim in its Motion to Dismiss that the Motion to Quash and the Motion to Set Aside the Verdict were not decided upon their merits would seem to find no support in the opinion of the Supreme Court of North Carolina.

But this claim of appellee does suggest a similarity in this connection between the instant case and **Irvin v Dowd, ——US ——, 3 L ed 2d 900, 907, 79 S Ct 825,** where this court said of an opinion of the Indiana Supreme Court:

> "The court's statement that its conclusion on the escape point made it 'unnecessary' to consider the constitutional claim was not a holding that the judgment was rested on that ground. Rather, the court proceeded to determine the merits 'because of the finality of the sentence' and 'to satisfy ourselves that there is no miscarriage of justice.' In this way, in our view, the State Supreme Court discharged **the obligation which rests upon 'the State courts, equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .'** Robb v Connolly, 111 US 624, 637, 28 L ed 542, 546, 4 S Ct 544." (Emphasis added)

On Page 115 of the Record, the Supreme Court of North Carolina said in its opinion: **"Defendants moved to set aside the verdict of guilty."** There follow the rest of Page 115, all of Pages 116 and 117, and almost half of Page 118, in which the Supreme Court of North Carolina discusses the Motion to Set Aside the Verdict, concluding with the sentence: **"Defendants were not, as a matter of right, entitled to have the verdict set aside."**

Appellants believe that this is a clear approval on the merits of the trial court's denial of the Motion to Set Aside the Verdict.

Legal Meaning of Expression "The Merits"

The Supreme Court of North Carolina having spoken of **"the merits"** in describing its disposition of the questions before it, this expression should be understood to have been used

with its normal legal meaning and significance. Compare **Bell v Hood, 327 US 678, 90 L ed 939, 66 S Ct 773,** where the meaning of the expression, **"the merits,"** is discussed in a jurisdictional setting, in connection with rulings on a pleading alleging rights claimed under the Constitution of the United States.

Appellants respectfully suggest and believe that this Court has jurisdiction to reach the merits of this case, either under 28 USC 1257 (2) or under 28 USC 2103.

ARGUMENT II

THE CASE ON THE MERITS

A. THE SUPREMACY CLAUSE QUESTIONS

(1) Does the State policy of making Gillespie Park Golf Course "a private club for members and invited guests only" (R 44, 75) collide unconstitutionally with the policy of Federal law that this facility must provide "the greatest degree of public usefulness"? (See Appendix 3-g, Page 94.) Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it seeks to implement such a State policy that is in direct conflict with Federal law?

When this golf course was first constructed, 65% of the cost came from Federal funds provided by the **Emergency Relief Appropriation Act of 1939, of June 30, 1939, 53 Stat 927, Chap 252. (See Fact No. 4, supra.)** Section 11 (c) and Section 14 of this Act provide the following:

"Sec. 11 . . . (c) No non-Federal project shall be undertaken or prosecuted under appropriations under this joint resolution (except under section 4) unless and until the sponsor has made a written agreement to finance such part of the entire cost thereof as the head of the agency, if the agency administers sponsored projects, determines under the circumstances is an adequate contribution taking into consideration the financial ability of the sponsor . . . "

"Sec. 14. Agencies receiving appropriations under this joint resolution are authorized to prescribe such rules and regulations as may be necessary to carry out the purposes for which such appropriations are made."

Section 28 of the Act provides sanctions against "discrimination on account of race" and also against depriving "any person of any of the benefits to which he may be entitled under any such appropriations . . ."

Pursuant to said Section 14 the W. P. A. adopted the **Manual of Rules and Regulations, Federal Works Agency, Work Projects Administration (Library of Congress Book Number HD-3881, .A58.)** Photographic reproductions of pages from that Manual, pertinent to this case, are attached hereto as Appendixes 3 (a) to 3 (i) inclusive. The following quotations are examples of the Federal policy that this golf course, built with Federal funds, was to be fully public and not private:

"The Work Projects Administration is charged with the responsibility of providing work for needy persons on useful **public projects.** It carries out this responsibility by operating, or cooperating in the execution of, projects sponsored by public bodies **which are designed to provide additional facilities, activities, or services of benefit to the general public."** (Emphasis added. See Appendix 3-g.)

"The Work Projects Administration, in cooperation with sponsors, is responsible for selecting projects for operation **which offer the greatest degree of public usefulness** consistent with the employment of certified workers in the area." (Emphasis added. See Appendix 3-g.)

"The efficiency of WPA project operations and the **usefulness of completed facilities to the general public** are dependent upon the adequacy of plans and specifications furnished by the project sponsor and the timely fulfillment of obligations either assumed by the sponsor or which the sponsor may reasonably be expected to assume **in view of the public benefit accruing to the community.** (Emphasis added.—Appendix 3-h, Page 95.)

"A sponsor of a WPA project must have legal authority

to engage in the work embraced by the project and in the area covered. **The sponsor shall further be responsible for the continued public use or benefit of the facility or service provided by the project sponsored.**" (Emphasis added. See Appendix 3-i, Page 96.)

These rules and regulations, of course, have the force of law. **Lilly v Grand Trunk Western Railroad Company, 317 US 481, 488, 87 L ed 411, 416, 63 S Ct 347.** In **Ivanhoe Irrigation District et al. v McCracken, 357 US 275, 295, 2 L ed 2d 1313, 1327, 78 S Ct 1174,** it is said:

> **"Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges."**

In **Clearfield Trust Company v United States, 318 US 363, 366, 367, 87 L ed 838, 841, 63 S Ct 573,** this Court said:

> **"When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of . . . 1935, 49 Stat 115, c 48. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or any other state . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."**

The State's Use of Its Criminal Sanctions to Enforce State Policy in Conflict with Pertinent Federal Policy

In **Miller v Arkansas, 352 US 187, 190, 1 L ed 2d 231, 233, 77 S Ct 257,** a contractor bid upon work at an Air Force Base in Arkansas, the bid was accepted by the United States, and the contractor began work on the project.

The State of Arkansas prosecuted the contractor "for

submitting a bid, executing a contract, and commencing work as a contractor in the State of Arkansas without having obtained a license under Arkansas law . . ."

The contractor was found guilty and fined, and the trial court's judgment was affirmed by the Supreme Court of Arkansas.

On appeal to this Court the judgment was reversed because of the **"conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government."**

Appellants respectfully suggest that likewise in the instant case there is a similar conflict between the requirements of North Carolina that persons seeking to play golf on Gillespie Golf Course must meet the membership conditions of "a private club" and the Federal law and policy that this golf course, built with Federal funds pursuant to a Federal statute and its authorized rules and regulations, must be operated so as to **"offer the greatest degree of public usefulness."** (See Appendix 3-g.)

In the **Ivanhoe Case,** supra, this Court said:

> **"Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action."** (357 US at 295.)

(2) Can the State constitutionally avoid or vitiate the agreement made with the United States by its agencies, City of Greensboro and Greensboro City Board of Education, that during its useful life this golf course would be operated **"for the use and benefit of the public"** and would not **"be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation"?** (See Fact No. 4, supra) Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it seeks to implement avoidance by the State's agencies of their agreement with the United States that this golf course would thus be operated?

It seems to be settled that **"the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See Railway Employees' Dept. A. F. of L. v Hanson, 351 US 225, 232, 100 L ed 1112, 1130, 76 S Ct 714." See Local 24 etc. v Oliver, —US—, 3 L ed 2d 312, 321, 79 S Ct 297.**

In United States v County of Allegheny, 322 US 174, 183, 88 L ed 1209, 1217, 64 S Ct 908, this Court said:

> **"The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state."**

That there was such an agreement as indicated in this question No. (2) under the Supremacy Clause is clear from the opinion of Judge Hayes which the State Supreme Court said was before the State courts, and the facts appearing in that opinion which the State Supreme Court said were known to the State courts. (See Fact No. 4, supra.) Besides, since the agreement was required by Federal law, it will be presumed that the agreement was made. **Southern Pacific Company v Steward, 245 US 359, 362, 62 L ed 345, 38 S Ct 130.**

It would be an anomaly, if flagrant violation of the agreement with the United States by appellee State's agencies could be made the basis for prosecution and punishment of citizens by the State for the exercise of rights vouchsafed to the public by such agreement. In this connection the City of Greensboro freely admitted in its brief before the Court of Appeals for the Fourth Circuit (See Appendix 1-a) that it violated this agreement from the first day the golf course was opened until 1949.

The Federal Agreement as Basis for Bona Fide Belief of a Right to Play Golf on Gillespie Park Golf Course

Appellants believe that this agreement on the part of

appellee State's agencies with the United States gave to citizens as members of the public an absolute right to be free from the membership requirements of "a private club" in playing golf on this golf course. However, the Supreme Court of North Carolina said in its opinion in this case (R 111) that it was a sufficient defense to the crime of trespass "for defendants to establish that they entered upon a **bona fide** belief of a right to so enter, which belief had a reasonable foundation in fact."

It would seem to appellants that this solemn agreement by the State's agencies with the United States would provide an unassailable basis for their "bona fide belief of a right" to play golf on this golf course, as well as for an unquestionable "reasonable foundation in fact" for such belief. Certainly, it would seem unreasonable for the jury and the trial court to find otherwise, especially since those jurors who had played on this golf course, upon their voir dire examinations, "stated **very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees.**" (R 93)

This being an agreement with the United States, under **U. S. v County of Allegheny, supra,** its effect to give appellants such "a bona fide belief of a right" to play golf on this course presents a question of Federal law **"not controlled by the law of any state;"** and under **Ashcraft v Tennessee, supra,** the examination of this question by this Court **"cannot be foreclosed by the finding of a court or the verdict of a jury, or both."** See also **Haley v Ohio, 332 US 596, 599, 92 L ed 224, 228, 68 S Ct 302.**

Especially should this be true, appellants believe, in view of the fact, set forth in Judge Hayes' opinion (See Fact No. 10, supra,) that **"The brief filed by the City of Greensboro . . . lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens in the enjoyment in the use of the park."**

(3) Can the State constitutionally make a crime out of

identical acts and conduct which the Federal Courts have held to be protected by the Constitution of the United States, and make lawful acts of the State's agencies which the Federal Courts have held to have been "unlawfully" committed against the "constitutional rights" of the appellants? Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it renders ineffectual the judgments of United States Courts?

In their Motion to Set Aside the Verdict the appellants set out **verbatim** the Declaratory Judgment of the United States District Court for the Middle District of North Carolina in the following allegations (R 92):

"II. That the Supremacy Clause (Article VI) of the Constitution of the United States requires this Court to give effect to and to enforce the judgments of the United States Courts covering the subject matter of this prosecution, particularly the 'Decree and Injunction' of the United States District Court for the Middle District of North Carolina, in Civil Case No. 1058, in which these defendants were plaintiffs and Gillespie Park Golf Club, Inc., was one of the defendants, covering the identical acts and conduct charged by the State to be a crime of trespass in this case, said 'Decree and Injunction' reading in part as follows:

"'It is now ordered, adjudged and decreed that defendants have unlawfully denied the plaintiffs as residents of the City of Greensboro, North Carolina, the privileges of using the Gillespie Park Golf Course, and that this was done solely because of the race and color of the plaintiffs, and constitutes a denial of their constitutional rights, and unless restrained will continue to deny plaintiffs and others similarly situated.'.

"That the State of North Carolina and its Jury in this case undertake to find to be criminal the identical acts and conduct which said 'Decree and Injunction' holds to be protected by the Constitution of the United States, and further undertake to find to have been lawfully done, that which said 'Decree and Injunction' holds was 'unlaw-

fully' done, and that to permit said verdict to stand and to punish these defendants on the basis of said verdict would nullify and render ineffectual the rights of these defendants which said 'decree and injunction' holds to be guaranteed and protected by the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment."

The appellee State did not answer or controvert these allegations in any way.

The general principle of the supremacy of decisions of the Federal Courts upon Federal matters and rights was set forth by this Court in **Cooper v Aaron, 358 US 1, 18, 3 L ed 2d 5, 16-17, 78 S Ct 1401**, as follows:

"Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of Marbury v Madison (US) 1 Cranch 137, 177, 2 L ed 60, 73, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

Appellee seems to concede, at least by implication, that it would be bound by the above-quoted Declaratory Judgment of the Federal Court if it had in any way been a party to the proceedings. "The Court will further note," appellee says on Page 4 of its Motion to Dismiss in this Court, "that the State of North Carolina was **in no manner** made a party to this civil action in the Federal Court." (Emphasis added.) This same concession seems to be implicit in the State Supreme Court's opinion (R 116):

"The State challenges the assertion that there has been an attack, collateral or otherwise, on the judgment ren-

dered by the District Court. It maintains that the questions to be answered are these: (1) Should a court take judicial knowledge of facts found at another time by another court in another action; and if this question be answered in the affirmative, (2) is the State, in a criminal prosecution, concluded by facts found in a civil action **to which it is not a party?"** (Emphasis added)

The first question, of course, appellants believe, was beside the point, because appellants had alleged **verbatim** the Declaratory Judgment of the Federal Court, and appellee State had not answered or denied or controverted the allegations in any way.

The State Was Constitutionally a Party to the Federal Court Case.

As to the second question, appellants believe that the State was constitutionally a party to the **Simkins Case** under the principles announced and confirmed by this Court in **Cooper v Aaron, supra.** The State of North Carolina occupies the same relationship constitutionally to the **Simkins Case** that the State of Arkansas occupied to **Cooper v Aaron.** In both cases Negro plaintiffs had sued agencies of the State to vindicate constitutional rights. In both cases the Federal Courts had issued Declaratory Judgments establishing those constitutional rights. The State was not a party by name in either case.

Under these circumstances, in his concurring opinion in **Cooper v Aaron,** Mr. Justice Frankfurter said: "Accordingly, while Arkansas is not a formal party in these proceedings and a decree cannot go against the State, **it is legally and morally before the Court." (358 US at 22)** (Emphasis added)

Can there be any doubt that the position of this Court would have been the same in **Cooper v Aaron** if, instead of being faced with a situation where the Governor of the State had called out the National Guard to prevent the Negro children from exercising their "constitutional rights" which had been duly declared by the Federal Courts, this Court had been faced with a situation where the State's prosecutor had waited until the Negro children went upon the grounds

of Central High School (after some representative of the State had told them to stay away or to leave after they had entered), and then thrown the children in jail on warrants charging a violation of the State's criminal trespass statute? (See **Thomason v Cooper, supra.**)

Appellants believe that such is the exact situation presented by the instant case. The warrants involved in this case were drawn and appellants were arrested under them after the Declaratory Judgment quoted above had been issued, and after it had been affirmed by the Court of Appeals for the Fourth Circuit, establishing (as the Federal Courts are authorized to do by the Federal Declaratory Judgment Act, 28 USC 2201) that the identical acts and conduct charged by the State to be a crime in this case represented the "constitutional rights" of appellants under the Constitution of the United States, and also establishing that these "constitutional rights" had been "unlawfully denied" to appellants by appellee State's agencies.

The State thus by its convictions and sentences in this case as effectively thwarts and renders ineffectual the Declaratory Judgment of the Federal Courts as the State's National Guard troops had done in **Cooper v Aaron.** Appellants believe that the Supremacy Clause forbids such action by any State. " **'It is of the very essence of supremacy to remove all obstacles to its action within its sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.'** " **Public Utilities Commission v United States, 355 US 534, 544, 2 L ed 2d 470, 478, 78 S Ct 446.**

In **Cooper v Aaron, supra,** this Court said:

"If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, **and destroy the rights acquired under those judgments,** the constitution itself becomes a solemn mockery . . . ' " (358 US at 18) (Emphasis added.)

It cannot be disputed that the State statute (GS 14-134), as construed and applied in this case, undertakes in the Guilford County Court House to make a crime out of the identical

acts and conduct which, across the street in the Federal Court House, the Federal Courts had already held to represent the "constitutional rights" of appellants, protected by the Constitution of the United States from infringement by the State.

Appellants believe that the Supremacy Clause forbids the exertion of State power in the form of the convictions and jail sentences disclosed by the record in this case, in the teeth of the previously exerted Federal power in the form of the Declaratory Judgment of the Federal Court. In **Garner v Teamsters, etc, 346 US 485, 500, 98 L ed 228, 245, 74 S Ct 161,** this Court said:

> **"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land, and cannot be curtailed, circumvented or extended by a State procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded."**

Question of Offering the Federal Records in Evidence

While appellants believe that sufficient of the Federal Court proceedings were in the record and before the State Courts, the appellee State makes quite a point of this question in its Motion to Dismiss (See Pages 11 and 23). The State Supreme Court also makes a point of this contention in its opinion (R 115) in these words: **"Although defendants had the record in that case identified,** they did not offer it in evidence. It is not a part of the record presented to us. **Our knowledge of the facts in that case is limited to what appears in the published opinion."** (Emphasis added.)

The Record itself at Page 92 shows that the State Supreme Court inadvertently overlooked the fact that the Federal Court's Declaratory Judgment **was "a part of the record presented"** to that Court.

As to the Opinion of the Federal District Court, the State Supreme Court itself acknowledges that that Opinion was be-

fore the State Courts and that the State Courts **had "knowledge of the facts" contained in that opinion.** (R 115).

The Record also shows that the Federal District Court's Finding of Fact No. 33 (R 94) and Finding of Fact No. 30 (R 95-96), which were two of the key Findings of Fact, **were "a part of the record presented"** to the State Supreme Court.

But, generally as to the question of offering the Federal Court record in evidence, the simple truth is that the record was in fact offered in evidence and its admission refused. On Page 79 of the Record appears the following:

"Exception No. 22:

"Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible.

"Court: I am going to sustain the objection as to those two Exhibits, that is No. 6 and No. 7.

"Exception No. 22."

Appellants attach hereto photographic reproductions of Pages 58 and 59, marked Appendix 4 (a) and Appendix 4 (b), of the original "Transcript of Testimony" furnished to counsel for appellants in the State trial court by the Official Court Reporter in the trial of this case.

By some quirk of inadvertence the identification of the Federal Records as "Defendants' Exhibits 6 and 7", as shown by said Appendixes, was omitted entirely from the record which went to the Supreme Court of North Carolina on appeal.

On Page 14 of appellants' brief before the Supreme Court of North Carolina, the true fact was called to the attention of the Court by the following: "The Court erred in refusing to admit defendant's Exhibits 6 and 7, as set out in Exception No. 22. These exhibits were the decrees, the findings of fact, conclusions of law and opinion of the Federal District Court in the **Simkins** case and the opinion of the Court of Appeals, Fourth Circuit, in the same case."

Exercising its wide discretion to go outside the record for vital information concerning the true facts as to what transpired in the lower court (See **Mason v Commissioners of Moore, 229 NC 626, 627, 51 SE 2d 6, and Aycock v Richardson, 247 NC 234, 100 SE 2d 379,),** the Supreme Court of North Carolina went outside the record **(it could not be found in the record)** to find, with reference to the records of the Federal Court proceedings, that **"the defendants had the record in that case identified . . ."**

But by some quirk of inadvertence the Supreme Court of North Carolina failed to notice that the Federal Court records were identified as "Defendants' Exhibits 6 and 7," and therefore erroneously came to the conclusion that appellants did not offer these records in evidence.

In view of the North Carolina Supreme Court's wide discretion (See **Williams v Georgia, 349 US 375, 99 L ed 1161, 75 S Ct 814)** to go beyond the record to get at the truth, appellants do not believe that, if offering these Federal Court records in evidence should become a material issue, the above-mentioned quirks of inadvertence will render this Court powerless itself to look at the true facts in this case. Appellants could not call this to the attention of the State Supreme Court because no petition for rehearing is permitted in a criminal case in the Supreme Court of North Carolina. (See **State v Council, 129 NC 371 (511), 39 SE 814,** and Certificate of the Clerk of the Supreme Court of North Carolina (R 139).

Nor do appellants believe that on oral argument, the representatives of appellee will tell this Court that the true facts about offering the Federal Court records in evidence are other than as herein set forth.

B. THE FOURTEENTH AMENDMENT QUESTIONS

I. The "Equal Protection of the Laws" Questions

(1) Does the record show racial discrimination against appellants in the use of Gillespie Park Golf Course (a) by the "facts" in the "published opinion" of the Federal Court, which the State Supreme Court said were known to the State courts?

or (b) by the Declaratory Judgment of the Federal Court, which was alleged **verbatim** in the Motion to Set Aside the Verdict and which was not denied or controverted by the appellee State in any way? or (c) within the "rule of exclusion" established by such cases as **Hernandez v Texas, 347 US 475, 98 L ed 866, 74 S Ct 667, and Eubanks v Louisiana, 356 US 584, 2 L ed 2d 991, 78 S Ct 970?** Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it seeks to implement and make good such racial discrimination?

The Opinion of the United States District Court for the Middle District of North Carolina (149 Fed Supp 562) and that Court's Declaratory Judgment (R 92) show abundantly and clearly racial discrimination against appellants. They speak for themselves.

The **"rule of exclusion"** by which racial discrimination may be proved was set forth in **Hernandez v Texas, supra,** as follows (347 US at Pages 480, 481):

> "Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by Norris v Alabama, 294 US 587, 79 L ed 1074, 55 S Ct 579. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the **'rule of exclusion'**, has been applied in other cases, **and it is available in supplying proof of discrimination against a delineated class."** (Emphasis added.)

> "To rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established, the State offered the testimony of five jury commissioners that they had not discriminated against persons of Mexican or Latin American descent

in selecting jurors. They stated that their only objective had been to select those whom they thought were best qualified. This testimony is not enough to overcome the petitioner's case."

The record shows that appellants are Negroes (R 32, 91) The 1950 Census shows that Negroes constitute 25 per cent of the population of Greensboro, North Carolina.* Three colleges (The North Carolina Agricultural and Technical College, Immanuel Lutheran College, and Bennett College)*, whose students and faculties are predominantly Negroes are located in Greensboro. The Federal Court's Opinion (149 Fed Supp at 563) shows that one of the appellants is "a dentist and practicing his profession in Greensboro." The Federal law under which the golf course was built requires (See Appendix 3-g) that this golf course must provide "the greatest degree of public usefulness."

City of Greensboro candidly conceded in its brief before the United States Court of Appeals for the Fourth Circuit that, from the time this golf course was built about 1940 **"until 1949, the City operated the golf course exclusively for white citizens."** (See Appendix 1-a)

Appellee State's witness, Clyde Bass, the Assistant Pro in charge, testified: "To my knowledge, no Negroes have ever played at the Gillespie Park Golf Course before this date. Some Negroes have presented themselves before this date to play, but none have played to my knowledge." (R 45).

The trial judge sustained the State's objection to the question: "Why didn't they play?" (R 45)

Appellants believe that the above presents clear "prima facie proof of the systematic exclusion of Negroes from" Gillespie Park Golf Course and of racial discrimination against the appellants. Especially, in the opinion of appellants, should the "rule of exclusion" be applied to supply proof of racial discrimination in a case like this, since the State courts have

*See Robinson, "The North Carolina Guide," (1955), University of North Carolina Press, Pages 204, 205.

by their rules of evidence closed the mouths to the truth of the operators of the golf course, they being the persons who know more about the racial discrimination which they had practiced than anybody else. (See Record 45, 48, 78) Appellants discuss this phase of the case below under the Due Process Questions.

In this connection, it is revealing that, on Page 13 of its brief before the State Supreme Court, appellee says: "These exceptions relate to the exclusion of certain evidence by the trial court. **The question of whether or not Negroes had previously been refused to play on the golf course is utterly immaterial.**" (Emphasis added.) These actions of the trial court in excluding evidence of racial discrimination were sustained by the State Supreme Court: "The exceptions to the admission and exclusion of evidence have been examined. We have found none which indicates prejudicial error or appears to warrant discussion." (R 118)

It thus appears that, but for the **"rule of exclusion"** established by the decisions of this Court for the proof of racial discrimination, the State rules of evidence in this case would effectively prevent appellants from proving their constitutional right to be free from racial discrimination in the use of Gillespie Park Golf Course.

Pattern of Racial Discrimination Consistent with Everything and Inconsistent with Nothing in This Case

Everything in this case matches and is consistent with the pattern of racial discrimination, while nothing is inconsistent with that pattern. For instance, if racial discrimination had not been practiced against appellants in this case, and if "the question of racial discrimination in the use of the golf course was not involved in this case," as appellee says on Page 5 of its Motion to Dismiss in this Court, then how does appellee explain the facts of common knowledge (See Appendices 2-a to 2-g), which show that on the day before the Federal Court's injunction became effective forbidding any further racial discrimination at the golf course, after the club house had burned, the City collected the insurance money and appellee State's

agencies closed down the golf course and have never operated it for a single day since the Federal Court's injunction went into effect?

The pattern of racial discrimination in this case makes clear the truth of the finding in the Federal Court's Opinion, (149 Fed Supp at 563), which the State Supreme Court said the State courts had knowledge of: "The evidence does clearly show that white people were allowed to play by paying greens fees without any questions and without being members. When Negroes asked to play, they were told they would have to be members before they could play and it clearly appears that there was no intention of permitting a Negro to be a member or to allow him to play, solely because of his being a Negro."

The pattern of racial discrimination also makes clear the truth of the Federal Court's finding in said Opinion (149 Fed Supp at 565) that the brief of the City of Greensboro in that case "lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens in the enjoyment in the use of the park."

Since Gillespie Park Golf Course was one of the busiest in the Greensboro area (See Appendix 2-e), only the pattern of racial exclusion of Negroes can explain how it happened, as found by the Federal District Court in Finding of Fact No. 28 (See Page 73 of appellants' Statement As To Jurisdiction): **"That about seven years have expired under the leases and that during the time a total cumulative membership did not exceed 162 persons, and not more than 60 persons have membership in the corporation at this time."** This finding makes understandable the testimony of the Assistant Pro, Clyde Bass: "I know most of the members who present themselves to play." (R 44) This would obviously have been impossible if all of the people playing at Gillespie Park Golf Course had to be members, especially since he testified that he had worked at the golf course only "about 8 or 9 months" (R 44).

Only the pattern of racial discrimination can explain how the City of Greensboro could say in its resolution terminating

the lease of its "private club" (See appendix 2-g.): "Whereas, the Gillespie Park Golf Club, Inc. was created a non-profit, non-stock corporation and **no person, other than the City, has invested any funds in the corporation or in the Golf Course and its equipment;** and the Golf Club **has operated solely on funds derived from the use of the Golf Course."** (Emphasis added.) Especially is this so in view of the testimony of the president of Gillespie Park Golf Club, Inc., which appellee State seems to take at face value (See Page 8 of Motion to Dismiss) in appellee's statement that "the corporation invested about $100,000 in improvements and expanded it into an 18-hole golf course, and, further, they built a club house at a cost of about $5,000."

But the City's resolution is perfectly consistent with Finding of Fact No. 29 of the Federal District Court (See Page 74 of appellants' Statement As To Jurisdiction) "that the members and directors of the corporation have not invested a single cent of their own money in the corporation, while at the same time some of them have profited through compensation as officers and employees of the corporation." The State Supreme Court also seems to take at face value the testimony of the golf corporation's president: "There is evidence that lessee had, during its term, expended more than $100,000 in enlarging the course from a nine-hole course to an eighteen-hole course, constructing a club house, and making other improvements." (R 112)

So far as appellants have been able to discover, there is not a single fact or circumstance in this case which points to the absence of racial discrimination against appellants. If there are such facts or circumstances, surely appellee State will point them out in its brief. **No State witness denied racial discrimination.**

(2) Does the **"lack of standards in the license-issuing practice"** for playing on Gillespie Park Golf Course constitute "a denial of equal protection" without regard to racial discrimination, within the meaning of such cases as **Niemotko v Maryland, 340 US 268, 273, 95 L ed 267, 271, 71 S Ct 325?** Is the State's criminal trespass statute (GS 14-134) unconstitu-

tional as applied in this case, because it seeks to make lawful such "lack of standards"?

In **Niemotko** this Court "examined the licensing systems by which local bodies regulate the use of their parks and public places." (340 US at Page 271) This Court said:

> **"In the instance case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice,' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served." (340 US 271-272)**

And this Court held in **Niemotko:**

> "It thus becomes apparent that **the lack of standards** in the license-issuing 'practice' renders that 'practice' a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was **a denial of equal protection.** Inasmuch as the basis of the convictions was the lack of the permits, and that lack was, in turn, due to the unconstitutional defects discussed, the convictions must fall." (Emphasis added.)

In his concurring opinion in **Niemotko,** Mr. Justice Frankfurter said:

> "The vice to be guarded against is arbitrary action by officials. **The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken."** (340 US at 285—Emphasis added.)

There is present here, in refusal to grant permission to appellants to play on the golf course, as this Court held in **Niemotko, a "lack of standards in the license-issuing"** authority entrusted to Gillespie Park Golf Club, Inc., concededly an agency of the State. "No standards appear anywhere"

and "no narrowly drawn limitations" appear in this case for granting permission to play on the Gillespie Park Golf Course, any more than such standards or limitations appeared in **Niemotko, supra.**

The State Supreme Court quoted with approval excerpts from the trial court's charge to the jury, such as: "'. . . the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Grensboro would have been had it operated the golf course itself.' " (R 113) But, under **Niemotko** and other cases cited in it, the City of Greensboro was obligated to establish **"standards"** and **"narrowly drawn limitations"** for the use of the golf course. Where do we find any such **"standards"** or **"narrowly drawn limitations"** to govern the granting of permission to play on Gillespie Park Golf Course? There are none!

The by-laws of Gillespie Park Golf Club, Inc. provided in Article 1, Section 2 (R 73): "The golf course and its facilities shall be used only by members, their invited guests, **members in good standing of other golf clubs,** members of the Carolina Golf Association, pupils of the Professional and his invited guests." (Emphasis added.)

The arbitrary manner in which this section of the by-laws was used is shown by the fact that, when appellants, who were members in good standing of Nocho Park Golf Club, appeared and sought permission to play, the provision in the by-laws which says "members in good standing of **other golf clubs**" (Emphasis added.) was interpreted and administered, without any amendment as provided in Article 5, Section 1 (R 75), to read: "members in good standing of other golf clubs which are members of the Carolina Golf Association." (R 76, 77). This expansion of the by-laws by interpretation was approved by the trial judge in his charge to the jury (R 87, 88).

Appellee says in its Motion to Dismiss: "Appellants are subject to the same eligibility conditions as any other race," meaning it seems that some white people might not meet the "private club" conditions which applied to Gillespie Park Golf Course. The answer to that suggestion is the same as that

given by this Court to a similar suggestion in **Shelley v Kraemer, 334 US 1, 22, 92 L ed 1161, 1185, 68 S Ct 836:**

> "It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. **Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."** (Emphasis Added.)

Appellee also emphasizes in its Motion to Dismiss (Page 8), as does the State Supreme Court in its opinion (R 114), the trial court's charge to the jury that all seeking to play on the golf course must comply "with the reasonable rules and regulations for the operation and maintenance and use of the golf course," and that nobody could be made "to comply with any unreasonable rules and regulations." The difficulty with this contention is that "no standards appear anywhere; no narrowly drawn limitations" **(Niemotko v Maryland, supra)** to govern either the managers of the golf course in granting or withholding permits to play golf, or to govern or guide the jury in its determination of what is "reasonable" or "unreasonable." For, it was said in **Niemotko:**

> "It is quite apparent that any disorderly conduct which the jury found must have been based on the fact that appellants were using the park without a permit, although, as we have indicated above, there **is no statute or ordinance prohibiting or regulating the use of the park without a permit."** (Emphasis Added.)

That the managers of Gillespie Park Golf Course did not consider themselves bound by any "standards" or "narrowly drawn limitations" is shown by the testimony of the president of Gillespie Park Golf Club, Inc., when he said: **"We set up our own rules . . . We operated completely on our own. The City had nothing whatever to do with it." (R 76)**

In addition Section 1 of Article 5 of the by-laws of Gillespie Park Golf Club, Inc., said: "Authority for the amending, altering or repealing of the By-Laws shall be vested in the Board of Directors." (R 75) By a two-thirds vote the seven

directors (R 74) could "amend, alter or repeal these By-Laws" at will. (R 75)

There were no "standards" or "narrowly drawn limitations" and "no circumscribing of this absolute power" (See **Niemotko v Maryland, supra**) thus vested in the Board of Directors of Gillespie Park Golf Club, Inc.

What is more, **"the voice of the State most presently speaking to the appellants"** (See **Raley v Ohio, supra, 3 L ed 2d at 1356),** when appellants sought to play this golf course, was Assistant Golf Pro Clyde Bass. Did he tell appellants of any "reasonable rules and regulations for the operation and maintenance and use of the golf course?" He did not. Instead, he **"told them it was a private club for members and invited guest only"** (R 44). No witness testified to the contrary.

The State's agencies, in their zeal to be letter-perfect in excluding Negroes, ran afoul of the Constitution's command of equal protection, without regard to racial discrimination. Appellants feel that in this case, as in **Niemotko, supra,** "the convictions must fall" for "lack of standards in the license-issuing" authority delegated to the managers of the golf course.

II. The "Due Process of Law" Questions

In **Wolf v Colorado, 338 US 25, 27, 93, L ed 1782, 1785, 69 S Ct 1359,** this Court said:

> **"This Clause exacts from the States for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty.' 302 US at 325**
>
> **"Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society."**

And, in **Bartkus v Illinois, ___US___, 3 L ed 2d 684, 689, 79 S Ct 676,** this Court said:

> **"Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of**

our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment."

(1) Do the State rules in this case which closed the mouths to the truth of certain key witnesses violate the standards of justice and fundamental fairness which the Due Process Clause of the Fourteenth Amendment commands of the States in criminal prosecutions? Is the State's criminal trespass statute (GS 14-134) unconstitutional as applied in this case, because it seeks to implement and make lawful such impediments to the discovery of truth?

Concurring in **Hawkins v United States, ___ US ___, 3 L ed 2d 125, 130, 79 S Ct 136,** Mr. Justice Stewart said:

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice."

In **United States v Reynolds, 345 US 1, 12, 97 L ed 727, 735, 73 S Ct 528,** this Court said:

"The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

The factual situation under this question and appellee State's attitude toward it are indicated on Page 13 of the State's brief before the Supreme Court of North Carolina in this case, as follows:

"Of course, there was no error in the Court refusing to allow the witness Hughes to be called as an adverse witness . . . This was a matter in the discretion of the Court, and counsel for the defendants have evidently confused Federal practice with State practice."

The question goes deeper than a matter of practice. The witness Hughes was president of Gillespie Park Golf Club,

Inc., and the State had rested its case without calling him as a witness. (R 50) This witness was the same John R. Hughes who testified in the **Simkins Case** in the United States District Court for the Middle District of North Carolina. There Judge Hayes had made Findings of Fact (See Appellants' Statement as to Jurisdiction, Pages 72-74) which showed the crucial nature of the information which this witness held in his bosom:

"21. That the City of Greensboro operated the Gillespie Park Golf Course from 1941 until 1949 for the comfort and convenience of white citizens only.

"22. That on or about February 1, 1949, the plaintiff, Arthur Lee, Jr., together with three other Negro citizens of the City of Greensboro, sought the use of the facilities of Gillespie Park Golf Course and were denied said use.

"23. On or about February 15, 1949, representatives of the Greensboro Men's Club, an organization of Negro citizens of the City of Greensboro, appeared before the City Council of the City of Greensboro and requested that Negro Citizens be given the right to play golf at the Gillespie Park Golf Course in as much as the city provided no facilities for Negro golfers.

"24. That on or about February 17, 1949, a group of Negro citizens of the City of Greensboro appeared before the City Parks and Recreation Commission and requested the use of all of the facilities at the Gillespie Park Golf Course. On March 2, 1949, the City Parks and Recreation Commission adopted a resolution recommending to the City Council of Greensboro 'that the City of Greensboro provide golf facilities for the exclusive use of Negro citizens' and that 'the golf course located off Asheboro Street, now used by White not be used by Negroes.' That the resolution embodying these recommendations was presented to the City Council of Greensboro on March 15, 1949 by John R. Hughes, Chairman of the Greensboro Parks and Recreation Commission and that the recommendations were approved by the City Council on said date.

"25. That the Greensboro Parks and Recreation Commission formulates a park and recreation program for the City

and serves the City in an advisory capacity in the formulation of park and recreation budget and policy.

"26. That the said John R. Hughes who appeared before the City Council on March 15, 1949 became the chief promoter and prime negotiator of the leases involved in this case. That at the first meeting of the Board of Directors of the corporation he was 'authorized and directed to meet with the Greensboro City Council and to have full authority to act on behalf of the corporation in securing a lease of the club house, golf equipment, and as much land as might be leased from the city, and also he 'was further instructed and empowered to contact the Greensboro school board and to negotiate an agreement for the lease of the nine-hole golf course on the school property off of Asheboro Street.' That the said John R. Hughes did in fact appear before the City Council and the School Board and did persuade them to authorize the leases involved in this case, and at all times involved in these negotiations, the said John R. Hughes was chairman of the Greensboro Parks and Recreation Commission.

"27. That the said John R. Hughes who appeared before the City Council on March 15, 1949 became the chief promoter and organizer of the defendant Gillespie Park Golf Club, Inc. That the meetings of the corporation were held in his office and he successively became a director, vice-president, secretary and president of the corporation. That he has been the attorney for the corporation from its inception to the present time.

"28. That about seven years have expired under the leases and that during the time a total cumulative membership did not exceed 162 persons, and not more than 60 persons have membership in the corporation at this time. That no meeting of the membership of the corporation has ever been held during the life of the corporation, and that only the members who are also on the board of directors have any voice in the affairs of the corporation. That the board of directors under the by-laws of the corporation is constituted of seven self-perpetuating members who have the sole power and authority to approve persons for membership and to amend or change

the by-laws. That no formal, recorded vote by the board of directors has ever been taken approving any person or persons as members and no meeting held for this purpose, all members appearing on the roll having been approved by telephone conversations between the Golf Professional and an undetermined number of the members of the board of directors.

"29. That all of the funds which have been paid out for operating the golf course under the leases have ultimately come from income which the City would have received direct except for the existence of the leases, and that the members and directors of the corporation have not invested a single cent of their own money in the corporation, while at the same time some of them have profited through compensation as officers and employees of the corporation. That during the life of the lease, funds of the defendant City of Greensboro, from sources other than the golf course have been invested in the property.

"30. That the leases in this case undertook to turn over to a corporation having no assests or income highly valuable income-producing property belonging to the City and the school board, the chief officer and promoter of said corporation being an official of the city, and the city having no prospect of getting anything from said leases except out of the income which the leased property was already bringing in, and with the city reserving the right to put into the property further investments from other sources than said income and that under these circumstances said corporation was in fact an agency of the city and the school board for the continued maintenance and operation of the golf course for the convenience of the citizens of Greensboro."

Under these circumstances counsel for appellants asked permission of the trial court to call the witness, John R. Hughes, as an adverse witness. This permission was refused. (R 72, 78) Thereupon counsel for appellants called Mr. Hughes as a witness and had him to identify the by-laws of Gillespie Park Golf Club, Inc. (R 72)

Then, on "cross examination" (R 75) the trial court permit-

ted the witness Hughes to make a number of self-serving statements for the golf corporation and its officials. (R 75-76)

On Page 77 of the Record appears this testimony of the witness Hughes: **"I did not testify for my association in the case of Simkins and others against the City of Greensboro, Board of Education and Gillespie Park Golf Club, Inc."**

Then counsel for appellants propounded this query: **"Q. Mr. Hughes, I hold in my hand a document purporting to be a transcript of the testimony in the case." (R 78)**

Immediately following this question, the following appears in the Record at Page 78:

"Mr. Kornegay: Objection.

"Court: Bear in mind that he is your witness.

"Mr. Marsh: I called him under 8-50.

"Court: I told you that you could call him as your witness. I'll be glad to read any statute that you have. The objection is sustained. Exception No. 19."

On Page 79 of the Record the following appears:

"In the Absence of the Jury, Mr. John R. Hughes Made the Following Statement to the Court:

"Mr. Hughes: If your Honor please, I would like to ask the Reporter to read the question and answer which I gave in my testimony, so that we may get the record straight.

"Question Read by Reporter as follows: 'Mr. Hughes, did you testify for your Association in the case of Simkins and others against the City of Greensboro, Board of Education, and Gillespie Park Golf Club, Inc.?'

"Mr. Hughes: In order that there may be no misunderstanding, I did testify in that case, but I was called as an adverse witness for the plaintiffs.

"Court: Do you wish to call Mr. Hughes back to the stand.

"Mr. Marsh: No, your Honor."

The trial court had already ruled that appellants could not prove by this witness what he testified to in the Federal Court proceedings.

Appellants respectfully submit that the appellee State has thus impeded "the discovery of truth" in this case and has thus impeded "as well the doing of justice." **(Hawkins v United States, supra)** Appellants further submit that the State has thus invoked "its governmental privileges to deprive" appellants of a fair opportunity to prove their full defense in this case and that this is "unconscionable" **(United States v Reynolds, supra),** and violates that which "is 'implicit in the concept of ordered liberty' " **(Wolf v Colorado, supra)** and also violates the "fundamental principles of our society" as well as "the conscience of society" **(Bartkus v Illinois, supra.)**

Appellants believe that the same principles apply to the refusal of the trial court to permit appellants to cross examine the State's witnesses as to the reasons why Negroes had not been permitted to play on Gillespie Park Golf Course. (R 45, 48)

Witnesses Hughes, Bass and Edwards, as president and employees, respectively, of the golf corporation, were testifying as to actions taken when they were agents of appellee State itself. (R 96)

(2) The Supreme Court of North Carolina having held for the very first time in this case that this criminal trespass statute (GS 14-134) applies also to **public** lands, and not just to lands **"privately held" (State v Clyburn, 247 NC 455, 458, 101 SE 2d 295),** does the judgment in this case send each of the appellants **"to jail for a crime he could not with reasonable certainty know he was committing" (Scull v Virginia, ___US___, 3 L ed 2d 865, 871, 79 S Ct 838)?**

The rule was stated in **Scull** as follows:

"To sustain his conviction for contempt under these circumstances would be to send him to jail for a crime he could not with reasonable certainty know he was committing. **This Court has often held that fundamental fairness requires that such reasonable certainty exist."** (Emphasis added.)

That citizens are entitled to rely upon decisions of the highest Court of a State which interpret the statutes of the State seems clear. In **National Association for the Advancement of Colored People v Alabama, 357 US 449, 457, 2 L ed 2d 1488, 1497, 78 S Ct 1163,** this Court said:

> "Even if that is indeed the rationale of the Alabama Supreme Court's present decision, such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, **in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.**" (Emphasis added.)

The appellee State seems to claim that the rule of decision by the Supreme Court of North Carolina has always been, and indeed still is that this criminal trespass statute (GS 14-134) applies only to lands **"privately held,"** as was the holding in **State v Clyburn, supra.** On Page 18 of its Motion to Dismiss in this Court appellee says: "The Supreme Court of North Carolina has not changed its rule in interpreting the statute because the evidence showed that the property **was in the possession of a private corporation** even though it was impressed with a non-discriminatory use." (Emphasis added.)

Since federal constitutional rights are involved in this case, this Court will, of course, determine for itself whether this golf course "was in the possession of **a private corporation,**" (Emphasis added.) in determining whether or not appellants had a "justified reliance upon prior decisions" **(NAACP v Alabama, supra)** that this criminal trespass statute did not apply to the public lands involved in this case. In **Niemotko v Maryland, supra,** this Court said: "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but **will reexamine the evidentiary basis on which those conclusions are founded.**" (Emphasis added.)

The facts show that these lands were owned by the City of Greensboro and the Greensboro City Board of Education; that the golf course was built pursuant to Federal law which required that these lands be public; that the City and the Board of Education, in order to induce the United States to pay 65 per cent of the cost, agreed with the United States that these lands would remain public and would not be leased or sold to any private or quasi-public interest; that the golf corporation was an agency of the City and the Board of Education, and Judge Hayes even found that the City's own brief before him "lends powerful weight to the inference that the lease was resorted to in the first instance to evade the City's duty not to discriminate against any of its citizens." (149 Fed Supp at 565)

Under these circumstances, how could any citizen understand "with reasonable certainty" that these lands were "privately held", so as to make the criminal trespass statute (GS 14-134) apply to these lands?

(3) Do the multiple criminal proceedings against appellants in this case reach the areas which the Due Process Clause forbids, such as **"fundamental unfairness"** or **"unduly harassing an accused" (Hoag v New Jersey, 356 US 464, 467, 2 L ed 2d 913, 917, 78 S Ct 829)**, or **"merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time"** (Concurring Opinion in **Brock v North Carolina, 344 US 424, 429, 97 L ed 456, 460, 73 S Ct 349)?**

The facts are clear. The warrants involved in this case constitute the third consecutive original criminal proceeding which appellee State has made appellants defend for playing on this golf course.

The first original proceeding was a set of warrants in the Greensboro Municipal-County Court, charging a criminal trespass upon the property of **"Gillespie Park Golf Course."**

The second original proceeding was a set of indictments in the Superior Court of Guilford County, charging the identi-

cal acts to be a trespass upon the property of **"Gillespie Park Golf Club, Inc."** (R 36-43)

The third original proceeding was the set of warrants in Municipal-County Court which are involved on this appeal. Four of the warrants charged a trespass upon the property of **"Gillespie Park Club, Inc."**

(a) On a de novo trial in the Superior Court of the warrants in the first original proceeding, "the prosecuting officer obtained the permission of the Court to amend the warrants so that they would read or describe the trespass as having been committed on the premises of 'Gillespie Park Golf Club, Inc.' . . ." (See Page 3 of Appellee's Motion to Dismiss in this Court.) On the same page, appellee says:" . . . under local practice this was a fatal variance. . ."

On appeal from the verdict of guilty, the State Supreme Court held the amendment to be a "fatal variance." State v Cooke et al., 246 NC 518, 98 SE 2d 885, reproduced on Page 55 of appellants' Statement as to Jurisdiction. The State Supreme Court cited cases to indicate that this "fatal variance" rule was well and long established in the State. (See Page 58 of Jurisdictional Statement.)

Appellants believe that any competent, careful, and effective prosecutor, concerned about justice as well as prosecuting, and mindful of the expense, ordeal and embarrassment of multiple criminal prosecutions for the same offense, would have known this "fatal variance" rule, and hence would have started over again without amending the warrants and forcing appellants to trial and appeal, only to have to defend again and again against subsequent criminal prosecutions for the same alleged offense.

Appellants respectfully suggest that, for the prosecutor under these circumstances to request and to receive permission for such a "fatal-variance" amendment, and to force appellants to defend against such an amendment and to appeal the guilty verdict under the same in order to protect their "constitutional rights" show either the kind of incompetency or the kind of casualness or the kind of ineffectiveness,

and hence the kind of fundamental unfairness, which the Due Process Clause forbids in state prosecutors in criminal proceedings.

(b) Without finally disposing of the warrants as originally drawn in the first proceeding (only the amendment was held invalid by the State Supreme Court and so far as the record is concerned the original warrants in the first proceeding are still outstanding charging a criminal trespass upon Gillespie Park Golf Course), the State caused indictments in the Superior Court to be found against appellants, as the second original proceeding charging the identical acts as a trespass upon the property of "Gillespie Park Golf Club, Inc." (R 36-43)

A State statute then in force (GS 7-64) had deprived the Superior Court of jurisdiction under these indictments because, as the State Supreme Court said, the offense charged was only a misdemeanor (R 109-110), but the State required appellants to defend against these indictments in court and when they were called for trial, the State's prosecutor took "a Nol Pros with leave" in said indictments (R 43), thus leaving them on the record as pending against appellants. **State v Smith, 129 NC 546, State v Williams, 151 NC 660.**

Appellants believe that a competent, careful and effective prosecutor, concerned with justice as well as with prosecution, would have been familiar with this statute of his State (GS 7-64) and would not have caused these indictments to be found against appellants and would not have required appellants to defend against these indictments in the teeth of this statute.

Appellants respectfully suggest that to cause these indictments to be found and to require appellants to defend against them under these circumstances show the kind of incompetency or the kind of casualness or the kind of ineffectiveness, and hence the kind of fundamental unfairness, which the Due Process Clause forbids in State prosecutors in criminal proceedings.

(c) The warrants in the instant case constitute the third original criminal proceeding which the State has brought

against appellants for the identical acts charged to be the crime of trespass in this case. Appellants verily believe that the only reason why there have been three successive criminal proceedings instead of one, was **"merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time"** (**See Brock v North Carolina, supra.**), and in this case a third time.[4]

In its opinion in 246 NC 518, the Supreme Court of North Carolina said: "If the rightful possession is in one other than the person named in the warrant or bill, there is a fatal variance." In accordance with this rule, the North Carolina Supreme Court held on its own motion that there was such a "fatal variance" between the name **"Gillespie Park Golf Course"** in the warrants and the name **"Gillespie Park Golf Club, Inc."** as the one claimed in the amended warrants and proof to have "the rightful possession."

In the teeth of this holding the prosecutor in four of the warrants here involved alleged that the premises belonged to **"Gillespie Park Club, Inc."**, while in two of the warrants he alleged that the premises belonged to **"Gillespie Park Golf Club, Inc."**

Appellants believe that this obviously indicates the pros-

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[4]The lack of care and competence with which the prosecutor approached this case is further shown by the fact that the warrants here involved against Phillip Cooke (R 2,) Leon Wolfe (R 7), George Simpkins, Jr. (name also misspelled, R 10), and Joseph Sturdivent (R 14), say that the alleged trespass was upon "the premises of **Gillespie Park Club, Inc.,**" (Emphasis added.), and only the warrants against Samuel Murray (R 18) and Elijah H. Herring (R 22) say that the alleged trespass was upon "the premises of **Gillespie Park Golf Club, Inc.,**" (Emphasis added.)

There was thus just as much of a variance between the name of the alleged possessor of the golf course in four of the warrants which are involved upon this appeal, as in the first set of warrants discussed by the Supreme Court of North Carolina in its first opinion in 246 NC 518, where the warrants charged a trespass upon the property of **"Gillespie Park Golf Course,"** while the amended warrants and proof showed an alleged trespass upon the property of **"Gillespie Park Golf Club, Inc."**

ecutor's indifference to the number of criminal proceedings he might require appellants to defend against for the same alleged trespass upon Gillespie Park Golf Course, and also indicates the prosecutor's confidence that, if the Supreme Court of North Carolina had again **of its own motion** noticed the "fatal variance", prosecutor would again be allowed "to see if he cannot do better" (See Brock v North Carolina, supra) in a fourth criminal proceeding against appellants for the same alleged trespass in this case.

But, either by oversight, or change of rule between the two opinions (See North Carolina Supreme Court's opinion in this case, where in the statement of facts it is said that the warrants charged a trespass "upon the premises of Gillespie Park Club, Inc.," (R 108) the Supreme Court of North Carolina did not **of its own motion** notice the "fatal variance" between the name **"Gillespie Park Club, Inc.,** in the warrants and the name **"Gillespie Park Golf Club, Inc."** as the one claimed in the proof to have "the rightful possession."

Appellants believe that this oversight or change of rule between opinions by the Supreme Court of North Carolina discloses fundamental unfairness and lack of due process and equal protection, and gives judicial approval to a prosecutor who has been "incompetent or casual or even ineffective" (See Brock v North Carolina, supra) in prosecuting successive criminal proceedings against appellants for the same alleged offense.

This Court is familiar, of course, with the expense and ordeal and embarrassment of such multiple, successive criminal prosecutions for the same alleged offense, and appellants respectfully submit that the three successive original criminal proceedings disclosed in this case for the same acts of playing golf on this public golf course amount to the kind of undue harassment and fundamental unfairness which the Due Process Clause forbids.

ARGUMENT III

THE QUESTION OF JUDICIAL NOTICE

Insofar as the Question of Judicial Notice should become important in this case, appellants believe that it may cut across both the question of Jurisdiction and the Case on the Merits. Therefore, this question is given separate treatment. The Question is:

What documents or facts which may become germane to a decision of this case come within the principles under which this Court will take judicial notice of such documents and facts?

(1) Documents Representing Federal Court Proceedings

It seems clear that this Court will take judicial notice of documents representing Federal Court proceedings. In **Brown v Board of Education, 344 US 1, 3, 97 L ed 3, 4, 73 S Ct 1,** this Court said:

> **"This Court takes judicial notice of a fourth case,** which is pending in the United States Court of Appeals for the District of Columbia Circuit, Bolling et al. v. Sharpe et al., No. 11,018 on that court's docket. In that case, the appellants challenge the appellees' refusal to admit certain Negro appellants to a segregated white school in the District of Columbia; **they allege** that appellees have taken such action pursuant to certain Acts of Congress; **they allege** that such action is a violation of the Fifth Amendment of the Constitution." (Emphasis added.)

It will thus be noted that this Court took judicial notice even of **the pleadings** in the **Bolling Case.**

In **Wells v United States, 318 US 257, 260, 87 L ed 746, 748, 63 S Ct 582,** this Court said:

> "Nor can we say that there is want of support for the district court's recital in its order that 'the matters and things' contained in the application to set aside the conviction 'have heretofore been adjudicated.' For the Government's brief points out that petitioner, before his application to the district court in this proceeding, had

unsuccessfully sought release from custody in two habeas corpus proceedings, **of which the Federal Courts may take judicial notice,** both brought in the Northern District of California. In the second, there was a hearing in which he testified in his own behalf; other evidence was taken both oral and documentary, and the court made findings of fact contrary to the allegations of fact on which petitioner now relies. We cannot say that the district court in this case was unfamiliar with those proceedings, **merely because they do not appear in the record before us."** (Emphasis added.)

In **United States v John J. Felin & Co., 334 US 624, 640, 92 L ed 1614, 1626, 68 S Ct 1238,** this Court said:

"The prior proceedings between the same parties as to which we would be blind not to take judicial notice, as well as the unquestioned facts pertaining to the meat industry are relevant to interpret the findings of the Court of Claims."

(2) Documents Which Represent Federal Law

The Supremacy Clause of the Federal Constitution says that "the Judges in every State **shall be bound"** by "the supreme Law of the Land" (Emphasis added.) "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus it has been held that the duty "rests upon 'the State courts, equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .' " **Irvin v Dowd, supra.**

It seems to be well settled that courts will take judicial notice of all matters of Federal law. In **Pocahontas Terminal Corporation v Portland Building and Construction Trades Council, 93 Fed Supp 217, 219, it is said:**

"While the complaint itself makes no mention of this statute and only incidental reference to the National Labor Relations Board, this Court takes judicial notice of any Federal laws necessarily brought into play by the allegations of the complaint; and it is immaterial that specific reference to such laws may be omitted in the

pleading. Southern Pacific Company v Steward, 1917, 245 US 359, 362, 38 S Ct 130, 62 L ed 345 . . ."

In the **Southern Pacific Company Case,** cited in the **Pocahontas Case,** it is said:

> **"While there is no specific allegation in the complaint that such bill of lading or receipt was issued, as the law makes it the duty of the carrier to issue the same the presumption is that such duty was complied with." (245 US at 362)**

It thus appears that judicial notice will be taken of all matters of Federal law. The Supreme Court of North Carolina has held that "in construing a Federal statute, a state court is bound by the construction placed on it by the Federal courts." **Mangum v Atlantic Coast Line Railway, 188 NC 689.**

This raises the question as to what is included in "the supreme Law of the Land" as envisaged by the Supremacy Clause of the Federal Constitution.

In **Garner v Teamsters, supra,** this Court said: "We conclude that **when federal power constitutionally is exerted** for the protection of public or private interests, or both, **it becomes the supreme law of the land."** (Emphasis added.)

Certainly a Federal Court's Declaratory Judgment and its Findings of Fact and Conclusions of Law, as well as its Opinion, which are clearly authorized by the Federal Declaratory Judgment Act, 28 USC 2201, represent actions "when federal power constitutionally is exerted," and as such become a part of Federal law and "the supreme law of the Land." In this case the North Carolina Supreme Court held that it was required to take judicial notice only of the "published opinion" of the United States District Court for the Middle District of North Carolina. "Our knowledge of the facts in that case," the State Supreme Court said, "is limited to what appears in the published opinion." (R 115) **Appellants believe that there is no valid basis for drawing a distinction between the exertion of Federal power in the Federal Court's opinion and its exertion in the Declaratory Judgment and its supporting Findings.**

(a) Judicial Notice in Applications of Federal Law

In **Bowles v United States, 319 US 33, 35, 87 L ed 1194, 1196, 63 S Ct 912,** this Court said the following in connection with its use of judicial notice in application of Federal law:

"On the argument before us the Government, which in the district court had denied petitioner access to his Selective Service file, produced from the file, and tendered for our consideration (1) a copy of petitioner's appeal to the President from the action taken by the appeal board, (2) a copy of the decision on that appeal rendered by the Director of Selective Service, by authority of the President and pursuant to Section 628.1 of the Selective Service Regulations, and (3) a copy of the letter of the draft board notifying petitioner that upon his appeal to the President his classification had been affirmed and that he would therefore be ordered to report for induction.

"The decision of the Director, **of which we take judicial notice . . .**" was held to be a "controlling determination of fact . . ." (Emphasis added.)

In **Lilly v Grand Trunk Western Railroad Company, 317 US 481, 488, 87 L ed 411, 416, 63 S Ct 347;** this Court said:

"Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. No claim is advanced that the rule is invalid, and we see no reason for questioning it. **Adopted in the exercise of the Commission's authority, Rule 153 acquires the force of law and becomes an integral part of the Act . . ., to be judicially noticed."** (Emphasis added.)

(3) Judicial Notice of Public Documents

In **Zahn v Transamerica Corporation, 162 Fed 2d 36, 48,** the Court says: **"We may take judicial notice of the pleadings in the Neff case since they are public documents."** The **Neff Case** was a State Supreme Court case, 232 Ky 66.

(4) Judicial Notice of Matters of Common Knowledge

In **Schulte v Gangi, 328 US 108, 120, 90 L ed 1114, 1122, 68 S Ct 925,** this Court said: "**We will take judicial notice, as a matter of common knowledge,** that New York City produces more garments for interstate shipment than any other city in the Nation." (Emphasis added.)

In **Parker v Brown, 317 US 341, 363, 87 L ed 315, 333, 63 S Ct 307,** this Court took judicial notice of "available data of the raisin industry in California."

(5) General Principles and Philosophy of Judicial Notice

In the book, "Evidence—Cases and Materials"—Morgan, Maguire and Weinstein (1957) Chap. 1, "Judicial Notice," Page 11, Mr. Justice Frankfurter is quoted as making the following observations in an exchange with counsel upon oral argument:

> **"I am merely going to the point that in these matters this Court takes judicial notice of accredited writings, and it does not have to call the writers as witnesses. How to inform the judicial mind, as you know, is one of the most complicated problems. It is better to have witnesses, but I did not know that we could not read the works of accredited writers."**

In Morgan, "Judicial Notice," (1944) 57 Harvard Law Review, 269, 286, the general view is taken that anything is subject to judicial notice which "is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy."

In "Sense and Nonsense About Judicial Notice" (1950) Keefe, Landis and Shaad, 2 Stanford Law Review 664, the authors say:

> "We know that not every fact is proved during the course of a lawsuit—**manifesta probatione non indigent** (what is known need not be proved). This practice has its roots far back in the civil and canon law. It is part and parcel of legal or judicial reasoning, no step of which

can be taken without assuming something that has not been proved. The capacity to perform this process with competent judgment and efficiency is imputed to judges and jurors as part of their necessary mental outfit."

(6) Judicial Notice in the State Courts

The North Carolina State Supreme Court took judicial notice of **"the published opinion"** of the Federal Court in the **Simkins Case, 149, Fed Supp 562,** saying: "Our knowledge of **the facts in that case** is limited to what appears in the published opinion." (R 115—Emphasis added.)

Appellants filed a formal motion requesting the Supreme Court of North Carolina to take judicial notice of records in the **Simkins Case,** certified copies of which were tendered for the convenience of that Court. (R 128—See **Bowles v United States, supra.)**

In the Motion to Quash filed in the Superior Court appellants requested that court "to receive and consider the record and judgment roll in the Federal case." (R 33) This request was repeated by reference in the Motion to Set Aside the Verdict. (R 92) Appellants believe that this was an adequate bringing of the Federal Court records to the attention of the trial court for purposes of judicial notice. Appellants also specifically requested the trial court "to take judicial notice of this matter of common knowledge" about racial discrimination at the golf course. (R 93) Of course, the Federal Court records were formally offered in evidence but refused admission by the trial court. (See Appendixes 4(a) and 4(b), Pages 97, 98.)

CONCLUSION

Wherefore, appellants pray that this Court enter an order as follows:

1. Taking jurisdiction of this appeal under 28 USC 1257 (2) or, in the alternative, treating the appeal papers as a Petition for Certiorari under 28 USC 2103 and granting such Petition.

2. Declaring that Section 14-134 of the General Statutes

of North Carolina, as construed and applied in this case, collides unconstitutionally with Paragraph 2 of Article VI (the Supremacy Clause) of the Constitution of the United States:

(a) In that said statute has been used here by the State to implement the State's policy of making a "private club" out of Gillespie Park Golf Course, contrary to the policy of applicable Federal law that said golf course should be a public golf course offering "the greatest degree of public usefulness."

(b) In that said statute has been further used here by the State to implement a State policy directly contrary to the agreement made by the State's agencies with the United States Government that this golf course would be a public golf course during its useful life and would not during such useful life "be leased, sold, donated, or otherwise disposed of to a private individual or corporation, or quasi-public corporation."

(c) In that said statute has been used here by the State to frustrate and render ineffectual the Declaratory Judgment of the United States District Court for the Middle District of North Carolina in Simkins et al. v City of Greensboro et al., 149 Fed Supp 562.

3. Declaring that Section 14-134 of the General Statutes of North Carolina, as construed and applied in this case violates the Due Process and/or the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States as follows:

(a) In that in the trial of this case the State closed the mouths to the truth of key witnesses, so that evidence material to appellants' defense was suppressed by the State's rules of evidence.

(b) In that the State in this case has unduly and unconstitutionally harassed appellants by multiple criminal proceedings allowed by the State only to permit a prosecutor who has been either "incompetent or casual or even ineffective" to see if he could not do better a second or a third time.

(c) In that appellants were denied the use of Gillespie Park Golf Course by the State's agencies because of the race

or color of appellants, and further in that appellants were arbitrarily denied use of Gillespie Park Golf Course because of the absence of standards to govern the State's agencies in the exercise of the authority granted them to determine who could and who could not play on said golf course.

4. Protecting and effectuating the above mentioned Declaratory Judgment of the United States District Court for the Middle District of North Carolina by such process as to this Court may seem just or proper.

5. Directing the Supreme Court of North Carolina to take appropriate steps to require the State's agencies to abide by their agreement with the United States Government covering said Gillespie Park Golf Course.

6. Ordering appropriate proceedings in the State courts to set aside the convictions and jail sentences now outstanding against appellants in this case, and to release appellants entirely therefrom and to release the sureties on the bonds of appellants.

7. Reversing the judgment of the Supreme Court of North Carolina in this case.

8. Giving to appellants such other and further relief as to this Court may seem just and proper under the facts and circumstances of this case.

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FACTS

In 1940, City of Greensboro and The Greensboro City Board of Education joined in an application to the Works Progress Administration of the United States government for funds with which to construct a nine-hole golf course on property owned by the school board. The application was approved, and the City and the W.P.A. constructed the course. The property was then leased to the City by the school board. Until 1949, the City operated the golf course exclusively for white citizens.

In 1949, at the request of the City, the City and the school board, in two separate leases, leased to Gillespie Park Golf Club, Incorporated, a private corporation, the original nine-hole course which was on school board property, and enough adjacent land owned by the City for an additional nine holes. In 1950, the City constructed an additional nine holes on its land, which it had reserved the right to do under the lease.

Also in 1950, the City constructed a nine-hole golf course for Negroes at Nocho Park and leased it to Nocho Park Golf Club, Incorporated, a private corporation.

Statements by the City Accountant show the net expenditures (total expenditures minus total income) on both courses to be the same—approximately fifteen thousand dollars for each. (Appendix, p. A26-A28.)

From the date when these golf courses were leased to private corporations, the lessees have had full control and management of the golf courses. No lease provides for any racial segregation of these facilities.

In November and December of 1955, Negroes sought to use the facilities of the Gillespie Park Golf Course, and were denied such use by employees of the Gillespie Park Golf Club, Incorporated.

if it operates them, and it has never asserted the right of its lessee to do so. All it asks is a dismissal of the action as to it.

POINT 2. THE DISTRICT COURT ERRED IN FINDING AS A FACT AND CONCLUDING, AS A MATTER OF LAW, THAT AN AGREEMENT EXISTED AMONG APPELLANT CITY OF GREENSBORO, THE GREENSBORO CITY BOARD OF EDUCATION, AND THE UNITED STATES GOVERNMENT, THAT APPELLANT CITY OF GREENSBORO WOULD "MAINTAIN AND OPERATE SAID GOLF COURSE FOR THE USE AND BENEFIT OF THE PUBLIC DURING THE USEFUL LIFE OF SAID GOLF COURSE."

POINT 3. THE DISTRICT COURT ERRED IN FINDING AS A FACT THAT AN AGREEMENT EXISTED AMONG APPELLANT CITY OF GREENSBORO, THE GREENSBORO CITY BOARD OF EDUCATION, AND THE UNITED STATES GOVERNMENT, THAT THE GOLF COURSE PROPERTY WOULD NOT BE "LEASED, SOLD, DONATED OR OTHERWISE DISPOSED OF TO A PRIVATE INDIVIDUAL OR CORPORATION, OR QUASI-PUBLIC CORPORATION, DURING THE USEFUL LIFE OF SAID GOLF COURSE."

(The arguments on Points 2 and 3 would be repetitious if stated separately, so they are combined for brevity.)

The issues involved in these points are raised by Finding of Fact No. 20 and Conclusion of Law No. 3 (Appendix, pp. A10-A11 and A15, respectively), which are apparently based upon provisions found in appellees' (plaintiffs') Exhibit No. 19. (Appendix, pp. A24, A25.) In their appli-

cation for federal funds with which to build the original nine-hole golf course on school property, the applicants were asked:

> "18. Is it *contemplated* that public property to be improved by this project will be leased, sold, donated or otherwise disposed of to a private individual or corporation, or a quasi-public organization, during the useful life of such improvement? no If (Yes or no)
> 'Yes,' a complete explanation must accompany the application." (Emphasis supplied.) (Appendix p. A24.)

On the reverse side of the page are the following instructions for answering question No. 18:

> "Item 18. Property to be improved by a WPA project must be used for the conduct of normal Governmental functions and for the benefit of the public. Before any proposal may be accepted by this Administration, it must be established that the sponsor *intends* to use the property for public purposes during the useful life of the improvements to be made under the project. If the question in item 18 is answered 'Yes,' complete explanation and documentation must accompany the application in order that the public benefit may be established." (Appendix, p. A24.) (Emphasis supplied.)

Appellees contended, and the District Court found, that this language constitutes an agreement which binds the City and the school board to operate and maintain the golf course during its useful life, and not to lease it to a private corporation during this period. But the District Court upheld the validity of the leases, and, in its decree and injunction, specifically excepts from the prohibition against disposal of the property a "*bona fide* sale." (Appendix, p. A22.) Consequently, Finding of Fact No. 20 and Conclusion of Law No. 3 are in conflict with Paragraph No. 1 of the decree.

APPENDIX 2 (a)

GREENSBORO DAILY NEWS

Published Every Day in the Year by Greensboro News Company

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age 4, Sec. D SUNDAY, JUNE 30, 1957

Give And Take On Golf Courses

Out of Raleigh and Richmond Friday fternoon came the double-whammy of wo judicial decisions—one state and one ederal—demolishing with obvious final- y resistance of the City of Greensboro o opening of Gillespie Park Golf Course o Negroes.

In the State Supreme Court case, a uperior Court finding of guilt against x Greensboro Negroes for "trespassing" n golf course premises was knocked own, largely on grounds of technicality n amended warrant), but knocked own all the same.

In the U.S. Fourth Circuit Court of ppeals case, the decision of Judge John- on J. Hayes denying discrimination by ace was tersely upheld, and the only ecourse open to the city was an appeal o a court even more firmly staked out n the issue.

Appeal of the case, we think, was foolish from the beginning. Experience in High Point, Charlotte and Asheville shows that dropping of racial restrictions makes scarcely no difference in golf course operation. There is some racial break-through, yes, but it bothers few if any white patrons; and the initial break-through—that is, elimination of the stigma—does not ordinarily bring on a deluge.

It would seem far better in the case of golf courses, libraries, busses and similar fields for the white South to find some means of adjustment to change; just as it would seem judicious indeed for Negro citizens to refrain from pushing their luck in swimming pool experiments and wholesale public school integration.

The South will adjust to some change—even where it has exhausted all its legal resources—unless it is pushed too hard.

APPENDIX 2 (b)

SECTION B— 8 PAGES

TUESDAY, AUGUST 6, 1957

City Gives Notice It Intends To End Golf Club Lease

The Greensboro City Council yesterday gave a 10-day notice to the Gillespie Park Golf Club Inc. that the city intends to cancel the club's lease and take over assets of the club.

The club was named a defendant, with the city, in a suit brought in Federal Court by Negroes claiming they had been denied admission to the city-owned course. The city and club lost the case. The city's lease to the club was declared valid by the court, but the court, ruling the club was an agency of the city, stated that Negroes could not be denied use of the course.

Notice of cancellation of the club's lease brought "no comment" from the president of the club, John R. Hughes.

City councilmen stated in their resolution that the club had abandoned the golf course and had failed to keep the club house and golf course in a good state of repair.

To Take Over Assets

They also notified the club that the council intended to take over all assets of the club, which was listed as a nonprofit, nonstock corporation.

On recommendation of City Manager James R. Townsend, the council accepted a cash settlement of $7,354 for fire damages to the club house. The cash was taken in preference to repairing the structure.

In other action, the council postponed for two weeks the adoption of a resolution ordering paving on Florida Street from High Point Road to Hardie Street. Three owners of tracts in the right of way told the council they could not afford assessments for the improvement.

APPENDIX 2 (c)

oro Record

Tuesday, August 13, 1957

City Council espie Course

learing Is Set or Committee lere Thursday

BY HAWK JOHNSON
Record Staff Writer

A petition urging the ity to reopen Gillespie ark Golf Course has been repared for presentation t Greensboro City Coun- il committee sessions hursday.

The petition containing names f 328 white and Negro persons ks the Gillespie Park Golf Club d the Council of the City of reensboro "to reopen Gillespie ark as a municipal golf course r the recreation of residents of e City of Greensboro."

The petition has been placed n the agenda for discussion y the city council's real estate committee when the four coun- il committees go in session t 2 p.m. Thursday in council hambers.

The request is the latest step in a series of events concerning the South Greensboro recreational facility which began last October when 10 Greensboro Negroes filed suit against the golf club, city and Greensboro Board of Education. The 10 sought racially integrated use of the 18 hole course which was operated by a private club leasing land from the city and school board. A federal court order gave the 10—and other Negroes "similarly situated"—permission to use the course along with white residents, a decision upheld by the U.S. Fourth Court of Appeals.

The integration order signed by Federal Judge Johnson J. Hayes followed by one day the announced decision of John R. Hughes, Gillespie Park Golf Club Inc., president, that operations at the course were suspended due to a fire which destroyed part of the clubhouse.

Only last week, city council gave notice to Gillespie Park Golf Club that the city will cancel its lease—which would have expired next April — on Aug. 15 (day of the committee session). City councilmen, in a resolution approved for cancellation of the lease noted that the club had breached the lease by failing to keep the clubhouse and golf course in a state of good repair. They notified the club that council intends to take over all assets of the club—a nonstock, nonprofit corporation.

The council also accepted a cash settlement of $7,354 for damages to the clubhouse because of fire.

Control of the course is still in doubt, however. The Greensboro Board of Education owns half of the course property containing half of the 18-hole layout. The board has given no indication of plans to cancel its lease with the golf club. Nor has the city announced what plans, if any, it has for the property, including the clubhouse, it holds title to.

The property has been zoned for industrial purposes and could be sold. Any sale, however, must be approved by the federal court which noted in its integration order that "a bona fide" sale of the property must be given court approval.

The petition bears signatures of several of the plaintiffs in the federal court action, names of a few ministers, both white and Negro residents of Greensboro and several with out-of-town addresses.

It will be presented to the council real estate committee composed of William Folk Jr., chairman; Tom E. Brown, vice chairman; J. M. Denny and Albert F. Stevens Jr.

The public works committee, headed by William B. Burke, will consider recommendations for water and sewer installations on Buff and Barringer Streets, report of curb and gutter deficiencies, widening of 16th Street and curb and gutter installation, preliminary resolutions calling for public hearings on laying water and sewer lines along several other city streets.

The transportation committee will be asked to deny taxicab operator's permit to Lewis E. Turner.

APPENDIX 2 (d)

B10—The Greensboro Record, Friday, August 16, 1957

Council To Decide Monday On Future Of Golf Course

The question of what to do with a city owned golf course will be before Greensboro City Council again Monday following hearing of a request yesterday to open Gillespie Golf Course.

City councilmen, sitting in committee sessions, voted to send the request to council at 2:15 p.m. Monday without recommendation.

A delegation of former Gillespie Park golfers, led by J. B. Danely of 2514 Walker Ave., appeared before the real estate committee to ask that the golf facilities be reopened. The course was closed to play June 27 by the Gillespie Park Golf Club Inc., a day before a federal court order was handed down prohibiting segregating golfers by races. The club, a non-stock, non-profit corporation, operated the course under a lease agreement with the city and the school board, property owners.

Ernest Edwards, golfing professional at the course, declared a "dire need" for the facility exists, explaining that 22,000 rounds were played there last year.

J. Kenneth Lee, Negro attorney, pleaded for improved maintenance at Nocho Park Golf Course for Negroes and insisted that there is a need for both golfing facilities.

An earlier motion by Councilman Tom Brown to send the request to the Parks and Recreation Commission for study was defeated 4-3 before committeemen decided to refer the petitions to a full council meeting without recommendation.

Other matters heard during committee sessions included a request by Mayor George H. Roach to the Guilford Health Department for 500 doses of Asiatic flu vaccine to protect city workers.

A request for $10,000 to erect a footbridge over North Buffalo Creek to provide access to Kiser Junior High School was sent to Monday's council meeting without recommendation as was a request by the Guilford Humane Society for an addition of $1,500 to the 1957-58 appropriation toward a county-Greensboro animal shelter.

Committeemen approved hearings on public necessity installation of curb and gutter on 16[illegible] Street, water and sewer on Buff Street and paving on Barringer Street.

APPENDIX 2 (e)

B12—The Greensboro Record, Tuesday, August 20, 1957

Permanent Closing Is Decreed For Gillespie Park Golf Course

Gillespie Park Golf Course, already overgrown with grass and weeds, has been sealed off from play by the Greensboro City Council, which yesterday ordered permanent closing of the recreational facility.

By unanimous vote of council, a resolution was passed ending play on the once popular recreational facility—one that has seen more than 175,000 rounds of golf played since the course was enlarged to 18 holes in 1950.

In voting to close the course at which a federal court order would allow integrated golfing, the council resolution pointed out that only a portion of the land is owned by the city and that portion is "inadequate for an 18-hole course." "Funds are not on hand" for operating the facility, the resolution stated, with the city having lost revenue this year from intangible taxes, and the city could not afford to spend money on golf course improvements without jeopardizing other recreational projects.

In 1940, the city and the city board of education, each owning approximately 75 acres of property off South Asheboro Street, applied for Works Progress Administration funds to build the course. The property was leased by the city by the school board and until 1949 the city operated the course for white citizens. Then, the city and board in two separate leases granted control to Gillespie Park Golf Club Inc., a private corporation. In 1950, the city constructed an additional nine holes on its portion of the property. (Also in 1950, the city built a nine-hole golf course for Negroes at Nocho Park.)

Last October, 10 Greensboro Negroes filed suit in federal court against the golf club, the city and school board, asking permission to play Gillespie Park. That request was granted by the district court and upheld by a June 28 ruling of the U.S. Fourth Circuit Court of Appeals.

Golf club directors, however, on June 27 had announced decision to close the course following a fire which destroyed a portion of the clubhouse. The city council recently voted to terminate its lease with the golf club as of Aug. 15 because the club had ceased to operate the facility and had failed to maintain the course property. The school board has not acted to cancel its lease with the club.

Attendance and participation records compiled each year by The Greensboro Record showed 22,803 rounds of golf were played at Gillespie Park in 1956, less than 2,000 rounds under Green Valley Golf Course, a private golf course which led all Greensboro area golfing facilities in numbers of rounds played.

Nine year totals for Gillespie participation—as far back as records go, show 178,007 rounds had been played there by the first of this year. There are no records for play on the South Greensboro course for 1957.

The council resolution not that the golf course site able for "expande cilities," leading late that the p utilized for a l use. Others c erty may be purposes. An must be appro court which re in disposal of

City Golf Course Ordered Closed Permanently 8/20/

The Gillespie Park Golf Course, closed since a fire damaged the clubhouse in late June, was ordered permanently closed by the Greensboro City Council yesterday.

Action was by unanimous vote of the council. It brought to an end the speculation created by the presentation of a petition to the council last week requesting that the course be reopened. Councilmen took no action regarding the nine-hole Negro course known as Nocho Park although a Negro minister, Rev. J. T. Douglas, pastor of St. James Presbyterian Church, gave an impassioned speech asking that the Gillespie and Nocho courses be improved.

The council resolution closing Gillespie stated that only a portion of the course (nine holes belonging to the city school board) was under control of the city, and that portion was insufficient to provide an adequate course.

(The city was under court order to desegregate the Gillespie course just prior to the fire.)

Other Needs Cited

Also, the council found that the city had need for expanding service facilities. That was interpreted to indicate the possibility that the city might use the area for a land fill for waste use.

The resolution stated, too, that, with the city having lost revenue from intangible taxes (estimated at $100,000), it could not afford to spend money on golf course improvements without jeopardizing other recreation projects.

After the resolution was read, a resident of the Gillespie Park neighborhood, George A. Minnish, objected to Negro children "running through there," objected to the Gillespie and Nocho courses being operated by the city and urged the council to close both courses.

Councilmen Reminded

Describing golf as a "vital part of our community life," Rev. Mr. Douglas reminded councilmen that recreational facilities and schools are two elements "seriously considered by new industries which might be interested in locating here."

He said the council's proposal to close the Gillespie course was a "step backward" at a time when "we shoud be working together to make progress" in interracial relations. The council, he added, might improve relations by improving neighborhood recreation areas.

Before concluding his talk on harmony and Christian conduct, the minister asked God's blessing on the council in the decision they were to make.

The preacher's remarks were followed by a short statement from Eugene Hood, recognized anti-integrationist.

Wants Course Closed

"I'm in favor of closing the golf course," said Hood. "There are a hundred acres out there you've been providing for a handful of golfers. . . . Golf is an expensive game. . . . And you shouldn't spend taxpayers' money for such a small group."

The council vote, all nine members voting to close the course, followed.

No voice, other than the minister's, was raised against the closing. Last Thursday, however, Ernest Edwards, golf professional, presented a petition signed by more than 300 persons asking that the course be reopened. Kenneth Lee, Negro attorney, also asked that the course be reopened and that Nocho Park course be improved.

The Mayor announced the appointment of the following committee memberships:

City-County Committee
D. Newton Farnell, Chairman
J. M. Denny
Tom E. Brown

Water Committee
William B. Burke, Chairman
E. E. Zane
Kibert F. Lewis

I, Hazel N. Burch, City Clerk of the City of Greensboro, hereby certify this to be a true and exact copy of Page #190 of Minute Book #31 of the City Council of the City of Greensboro.
Witness my hand and the corporate seal of the City of Greensboro, this the 6th day of February, 1959.

Hazel N. Burch
City Clerk

Councilman Burke introduced the following resolution and moved its adoption. The motion was seconded by Councilman Denny, and the resolution was adopted on the following roll call vote: Ayes: Brown, Burke, Denny, Farnell, Folk, Lewis, Roach, Stevens, and Zane. Noes: None.

RESOLUTION TERMINATING THE LEASE OF THE GILLESPIE PARK GOLF COURSE PROPERTY TO GILLESPIE PARK GOLF CLUB, INC., AND DIRECTING THE SUPERVISOR OF PUBLIC PROPERTY TO TAKE POSSESSION OF THE GOLD COURSE AND ALL PROPERTY AND EQUIPMENT OF THE CITY LOCATED THEREON AND ELSEWHERE 2515

WHEREAS, Paragraph 9 of the lease of the Gillespie Park Golf Course to Gillespie Park Golf Club, Inc., which is dated 7 April 1949 and has been renewed until 7 April 1958, recites that it is entered into for the purpose of permitting the Gold Club to operate a golf course on the Golf Course property, and the Golf Club has now abandoned the operation of the golf course;

WHEREAS, Paragraph 5 of the lease requires the Golf Club to keep the club house and equipment and facilities located therein and the personal property used in the operation of the club house and golf course in good state of repair, which the Golf Club has failed to do;

WHEREAS, Paragraph 12 of the lase provides that the City reserves the right to cancel the same upon ten days written notice to the Club, upon the failure of the Club to carry out any provision of the lease; and

WHEREAS, The Gillespie Park Golf Club, Inc., was created a non-profit, non-stock corporation and no person, other than the City, has invested any funds in the corporation or in the Golf Course and its equipment, and the Golf Club has operated solely on funds derived from the use of the Golf Course;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GREENSBORO:

1. That the City Attorney is directed to notify Gillespie Park Golf Club, Inc., of the cancellation of the above lease;

2. That the Supervisor of Public Property of the City is directed, ten days from the adoption of this resolution, to take possession of that portion of Gillespie Park Golf Course which is owned by the City; the club house; the equipment which was turned over to the Golf Club under the terms of the lease and which is listed in the lease by inventory; and all property acquired by and in the possession of the Golf Club including cash.

(Signed) William B. Burke

The City Manager advised the Council that the insurance company has offered to settle the fire damage to the Gillespie Park Clubhouse for the full amount of the damage, i.e., $7,384.00, and recommended acceptance of this amount. Councilman Zane introduced the following resolution and moved its adoption. The motion was seconded by Councilman Denny, and the resolution was adopted on the following roll call vote: Ayes: Brown, Burke, Denny, Farnell, Folk, Lewis, Roach, Stevens, and Zane. Noes: None.

RESOLUTION AUTHORIZING THE ACCEPTANCE OF PAYMENT FOR DAMAGES TO GILLESPIE PARK GOLF CLUBHOUSE 2516

WHEREAS, under the terms of a lease, dated 7 April 1949, and renewed from time to time, City of Greensboro is the beneficiary of a fire insurance policy covering the golf clubhouse at Gillespie Park golf course;

WHEREAS, the clubhouse has been damaged by fire to such an extent that it will cost $7,384.00 to repair it; and

WHEREAS, City of Greensboro has been offered the full amount of damages in settlement of the insurance liability;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF GREENSBORO:

APPENDIX 3 (a)

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PREFACE

The Manual of Rules and Regulations of the Work Projects Administration is designed for issuance as a four-volume edition of all policy and regulatory procedures for the organization and operation of the Work Projects Administration. When completed, it will consist of the following volumes:

Volume 1 Organization and Administration
Volume 2 Project Planning and Operation
Volume 3 Employment
Volume 4 Finance

The Manual is issued in loose-leaf form so as to permit the insertion or removal of pages upon which additions or deletions of procedural statements are made necessary by changes in policy or fact. Revised or added pages will be issued as needed, and the volumes shall be kept up to date by all persons to whom issued and who are entrusted with the responsibility of operation of any phase of the program.

To permit ready reference, as well as to provide a simple method of numbering which will allow expansion or contraction when needed, a page numbering system is provided based upon a modified decimal plan. Each page number consists of three sets of numbers set off by decimal points. The first series represents the volume number; the second series, the chapter number within the volume; and the third, the page number within the chapter. As a result, page 1 of chapter 1 of volume 1 would be identified by the number 1.1.001. Pages are numbered in a decimal series of three digits, permitting a possible original issuance of 999 pages to a chapter. In this way, when it is found necessary to add a page between two numbered pages (i.e., 1.3.015 and 1.3.016), the new page will be numbered as a fourth digit of the decimal using the number of three decimal digits immediately preceding the new page (i.e., 1.3.0155).

Volumes are divided into numbered chapters, and chapters into numbered parts. Further subject divisions are identified by titles but not by numbers. In this way, complete new subjects below a part division may be added without disturbing the subject numbering.

Revised pages will be identified by the following statement in the lower inside of the page "Revised _____(date)_____." Additional pages will show "Added _____(date)_____." Revised or added pages will be transmitted by means of a series of four "Transmittal Letters," one series for each volume and numbered consecutively for each series. The transmittal letters will serve the following threefold purposes:

1. Transmit as an attachment the pages to be substituted or added and give instructions for insertion.
2. State the new policy or the change in policy involved and the reason for such new policy or change in policy.
3. Give such nonrecurring instructions as are necessary to effect the new or changed policy and the date such policy shall be made effective.

APPENDIX 3 (b)

The material contained in this Manual will have to remain flexible in order that changes may be made to meet changing conditions or problems. Complete volumes will be issued in limited number in order to facilitate maintenance of an accurate mailing list for the forwarding of revisions for the maintenance of the books. It is the responsibility of all WPA employees to maintain the material on a current basis and to insert or substitute all additional or revised pages received. Transmittal letters shall be detached and filed separately.

In accordance with the authority vested in the Commissioner of Work Projects by the Emergency Relief Appropriation Acts, the rules and regulations, as stated in the Manual of Rules and Regulations, are declared to be the rules of the Work Projects Administration until changed or modified by the order of the Commissioner or the Law.

F. C. Harrington

F. C. HARRINGTON
Commissioner of Work Projects

APPENDIX 3 (c)

Chapter I

CREATION AND ORGANIZATION DEVELOPMENT

PART I. CREATION, PURPOSE, AND GENERAL AUTHORITY

Emergency Relief Appropriation Act of 1935.

The Emergency Relief Appropriation Act of 1935, approved April 8, 1935, provided an appropriation for relief and work relief on useful projects. The President of the United States was authorized by this act to establish and prescribe the duties and functions of necessary agencies within the Government to carry out this purpose.

Creation of the Works Progress Administration.

The President, by Executive Order No. 7034, dated May 6, 1935, created the Works Progress Administration to administer a program to provide relief and work relief and to increase employment by providing for useful projects for which funds were appropriated in the Emergency Relief Appropriation Act of 1935.

Objective and Basic Functions

Defined Objective.

The original purpose of the Works Progress Administration as expressed in Executive Order No. 7034 was as follows: "A Works Progress Administration is established which shall be responsible to the President for the honest, efficient, speedy, and coordinated execution of the work relief program as a whole and for the execution of that program in such manner as to move from the relief rolls to work on such projects or in private employment the maximum number of persons in the shortest time possible."

Under the President's First Plan on Government Reorganization, submitted to Congress on April 25, 1939, the Works Progress Administration was incorporated in the Federal Works Agency, under the name of Work Projects Administration.

The Work Projects Administration is responsible for the planning and operation of useful work projects sponsored by local and Federal agencies and designed and scheduled so as to provide a maximum employment in all localities where relief from unemployment is needed.

1.1.001

APPENDIX 3 (d)

Legislative Development of the Work Program

Continuation of Works Progress Administration by EMA Acts.

The powers and functions of the Works Progress Administration, as defined by Executive Order No. 7034, were continued by Executive Orders No. 7336, dated June 22, 1936, and No. 7649, dated June 29, 1937, which made applicable to the program carried on under the Emergency Relief Appropriation Acts of 1936 and 1937, respectively, all Executive Orders, rules, and regulations issued under authority of the Emergency Relief Appropriation Act of 1935.

Authority Vested in the Federal Administrator by EMA Act of 1938.

By the Emergency Relief Appropriation Act of 1938, the Works Progress Administration and the National Youth Administration were extended until June 30, 1939. This act also vested the Federal Administrator of the Works Progress Administration with authority to prescribe rules and regulations necessary for carrying out the purposes of the act insofar as they relate to the Works Progress Administration, and to make allocations to other Federal agencies.

Creation of Work Projects Administration by Reorganization Plan No. 1.

Under authority vested in him by the Reorganization Act of 1939, approved April 3, 1939, the President evolved Reorganization Plan No. 1 providing for the consolidation of the Works Progress Administration and its functions (with the exception of the National Youth Administration) and certain other agencies into the Federal Works Agency. The plan further provided that the Works Progress Administration and its functions should henceforth be administered as the Work Projects Administration. Reorganization Plan No. 1 was approved by Congress in Public Resolution No. 20, 76th Congress, to become effective July 1, 1939.

Basic Provisions of EMA Act of 1939.

The Emergency Relief Appropriation Act of 1939, approved June 30, 1939, appropriated funds to the Work Projects Administration for the purpose of prosecuting public projects approved under the Emergency Relief Appropriation Acts of 1935, 1936, 1937, and 1938, and certain types of public projects, Federal and non-Federal, as approved by the President. The act also authorized the Work Projects Administration to carry on, until June 30, 1940, the functions formerly vested in the Works Progress Administration subject to the provisions of the act.

APPENDIX 3 (e)

Position in the Federal Works Agency

Administrator Head of Federal Works Agency.

In creating the Federal Works Agency, the President provided in Reorganization Plan No. 1 that a Federal Works Administrator should be placed at the head thereof and charged with responsibility for the general direction and supervision over the administration of the several agencies consolidated into the Federal Works Agency, and for the coordination of their functions.

—Five Agencies Consolidated.

The agencies consolidated into the Federal Works Agency are:

1. Public Roads Administration (formerly the Bureau of Public Roads in the Department of Agriculture).
2. Public Buildings Administration (formerly the Public Buildings Branch of the Procurement Division in the Treasury Department; the Branch of Buildings Management of the National Park Service in the Department of Interior; and the functions of the National Park Service in the District of Columbia in connection with the general assignment of space, the selection of sites for public buildings, and the determination of the priority in which the construction or enlargement of public buildings shall be undertaken).
3. United States Housing Authority (formerly in the Department of Interior).
4. Public Works Administration (formerly the Federal Emergency Administration of Public Works).
5. Work Projects Administration (formerly the Works Progress Administration).

Commissioner of Work Projects.

Reorganization Plan No. 1 also provides that the Work Projects Administration shall be administered by a Commissioner of Work Projects.

Personnel and Property Transferred to Federal Works Agency.

The plan further provided for the transfer of the personnel of the several agencies consolidated into the Federal Works Agency and for the transfer of all records and property (including equipment) of the several agencies to the jurisdiction and control of the Federal Works Agency.

APPENDIX 3 (f)

PART III. RELATIONSHIPS BETWEEN WORK PROJECTS ADMINISTRATION AND OTHER PUBLIC AGENCIES

Public Agencies Concerned With WPA Program.

The character of the WPA program necessitates that its operation be carried out in close cooperation with other public agencies. The other public agencies concerned in the operation of the WPA program are classified as follows: (1) public agencies for which projects are operated and which sponsor such projects; (2) public welfare agencies which refer needy persons to the Work Projects Administration for certification for employment on WPA projects; and (3) Federal agencies which perform administrative and supervisory services for the Work Projects Administration. Liaison with such public agencies is maintained by WPA divisions as outlined in this part.

Relations With Project Sponsors

Necessity for Project Sponsors

Each WPA project is required to have a public agency as sponsor. The Emergency Relief Appropriation Act of 1939 specifically provides that the funds appropriated therein shall not be available for the operation of any project sponsored solely by the Work Projects Administration.

Eligible Project Sponsors.

Eligible sponsors for WPA projects are Federal departments; States, political subdivisions thereof, or legally constituted public agencies of a State or political subdivision; and those types of agencies and bodies specifically authorized to be eligible sponsors by the current Emergency Relief Appropriation Act. In special cases, nonprofit, quasi-public agencies which are legally controlled by public authority through power of appointment or otherwise, which receive their principal support by regular budgetary appropriations from public revenue, and the assets of which upon dissolution revert to public ownership, may sponsor WPA projects which are of direct and immediate benefit to the general public. Other eligible public agencies may act as co-sponsors with the official sponsor; nonpublic bodies and individuals who assist sponsors in planning or carrying out other WPA projects are designated as other contributors or cooperating sponsors.

Advising Project Sponsors.

The operating divisions of the Work Projects Administration are primarily responsible for consulting with and advising prospective sponsors as to the development of projects.

Liaison With Sponsors.

The operation of approved projects is a joint responsibility of the sponsors and the Work Projects Administration. Liaison with sponsors in the operation of projects is maintained by the WPA operating divisions.

Sponsors' Contributions.

The Emergency Relief Appropriation Act of 1939 also provides that "not to exceed three-fourths of the total cost of all non-Federal projects • • • undertaken within any State, Territory, possession, or the District of Columbia • • • shall be borne by the United States, and not less than one-fourth of such total cost shall be borne by the State and its political subdivisions, or by the Territory, possession, or the District of Columbia, as the case may be." Sponsors' contributions to the cost of projects may be in the form of cash, materials, and supplies, and to the extent that a financial burden is involved, such other items as equipment rentals, implements, space rentals, personal services at the project site, transportation and handling charges, publication and duplication costs, professional consulting services, certain types of installed equipment, land purchases, leases, easements, rights-of-way, and costs of production activities. Regulations governing amounts and types of sponsors' contributions are stated elsewhere in this Manual.

Chapter 5

GENERAL CONDITIONS OF PROJECT OPERATIONS

PART 1. AUTHORITY AND RESPONSIBILITY FOR PROJECT OPERATION

There will be found in this chapter those regulations and procedures which constitute the general conditions applying to the operation of all types of projects, particularly as such regulations and procedures involve principles or policies which are the special concern of persons charged with the responsibility of directing project operations. Special conditions pertaining to the operation of certain classes of projects and types of work are covered in succeeding chapters.

WPA Authority and Responsibility for Project Operation

WPA authority and responsibility for project operation.

—Sponsorship.

The Work Projects Administration is charged with the responsibility of providing work for needy persons on useful public projects. It carries out this responsibility by operating, or cooperating in the execution of, projects sponsored by public bodies which are designed to provide additional facilities, activities, or services of benefit to the general public. Although the sponsors' participation on some of these projects may be executed under contract between the sponsor and a contractor, the participation of the Work Projects Administration in a project so operated is on a "force account" basis and the contractor is recognized only as a representative of the sponsor.

—Selection of Projects.

The Work Projects Administration, in cooperation with sponsors, is responsible for selecting projects for operation which offer the greatest degree of public usefulness consistent with the employment of certified workers in the area. The fact that sponsors may in some instances provide personnel for project supervision does not relieve the Work Projects Administration of responsibility for the efficient and safe operation of WPA projects and the enforcement of all WPA rules and regulations.

—Functional Responsibility.

The Work Projects Administration is responsible for the general supervision of WPA projects. While the responsibility of direct supervision of a project is usually vested in the Work Projects Administration, this responsibility may be delegated to the sponsor. For purposes of this section, direct supervision shall be construed as carrying responsibility only for the execution of a specific task or series of tasks in accordance with WPA policies administered under general supervision. The Work Projects Administration also is responsible for the selection and assignment of WPA employees, timekeeping for WPA employees, payment of WPA employees, labor relations, accident prevention, providing for medical care and compensation for WPA employees injured in the line of duty, and for the care and disposition of Federal property and such sponsors' property as may be accepted into custody by the Work Projects Administration.

—Project Plans and Specifications.

The development of a general plan of operation of a project is the joint responsibility of the Work Projects Administration and the sponsor. In the case of construction projects, the Work Projects Administration does not assume responsibility for such matters as explorations, designs, plans, obtaining easements, specifications, lay-outs, or the establishment of grades or levels.

2.5.001

APPENDIX 3 (h)

However, it is expected that these will be checked in detail by WPA engineers or by appropriate specialists as to adequacy for the specific purpose, and that any found not to be in accord with good practice shall be called to the attention of the sponsor for review before work based on them is undertaken. Furthermore, work shall not be initiated until all proposed practices meet with the approval of the WPA engineers or specialists. The efficiency of WPA project operations and the usefulness of completed facilities to the general public are dependent upon the adequacy of plans and specifications furnished by the project sponsor and the timely fulfillment of obligations either assumed by the sponsor or which the sponsor may reasonably be expected to assume in view of the public benefit accruing to the community.

—Sponsors' Participation.

Funds appropriated to the Work Projects Administration are available primarily for the payment of wages to persons who are certified as in need. Since WPA expenditures for nonlabor purposes are limited, the character and efficiency of the work program supervised or operated by the Work Projects Administration is largely dependent upon the ability and willingness of project sponsors to supply funds, services, materials, and equipment promptly in accordance with the agreement in the project proposal and as required for project operations.

APPENDIX 3 (i)

Sponsor's Responsibility and Authority

Authority and Responsibility of Sponsor.

A sponsor of a WPA project must have legal authority to engage in the work embraced by the project and in the area covered. The sponsor shall further be responsible for the continued public use or benefit of the facility or service provided by the project sponsored.

—Services To Be Furnished by Sponsor.

The sponsor shall be responsible in the case of construction projects for the adequacy and promptness of such technical services as plans, specifications, lay-outs, grades, and levels as may be necessary or required for efficient project operation and, in the case of all projects, to the extent required by the limitations on expenditure of WPA funds for such purposes. He also shall be responsible for meeting the expense of such personal and nonpersonal services as are essential for the efficient operation of the project. Where reports or certifications from sponsors are required, sponsors are expected to prepare and transmit such reports and certifications promptly and accurately.

—Responsibility for Completion of Work.

As facilities and services provided through the operation of a WPA project accrue to the benefit of the sponsoring agency, it is required that the sponsor assume responsibility for bringing to a useful conclusion all units of work started, in the event that WPA funds are not available for the completion of such units. Within the limits of funds available, the Work Projects Administration will make every effort to complete units of work which have been undertaken, provided the sponsor fulfills his responsibilities relating to the prosecution of the work.

—Sponsor's Supervision.

The Work Projects Administration shall not delegate to the sponsor the responsibility for direct project supervision unless the sponsor has made provision for adequate and competent supervising personnel. Such personnel shall be qualified by training and experience in the field of the project activity and shall be acceptable to the appropriate representative of the Work Projects Administration.

— —WPA Representative.

Where a project is to be operated under the direct supervision of the sponsor, a WPA representative shall be assigned to the project in a capacity which carries authority to insure observance of WPA rules and regulations with respect to the specific project, and such responsibility of the WPA representative shall be specifically defined and understood by all parties concerned. The sponsor's supervisory personnel shall be responsible to such WPA representative for conducting the project in conformity with the project authorization and all applicable WPA rules and regulations. The sponsor's supervisor shall be employed sufficiently in advance of the starting of the project to permit the preparation by him and the WPA area supervisor of the work schedule, as required by the instructions prescribed on pages 2.5.010-2.5.011.

— —Authority of Sponsor's Supervisor.

Where direct supervision of project operations is being exercised by the sponsor, the sponsor's supervisory personnel shall have authority to plan the manner in which the work shall be prosecuted and the methods and sequence of operations which shall be followed, subject to the review of the appropriate operating division and subject to such limitations as may be fixed on the scope and extent of the work approved for operation by the WPA operating division having jurisdiction. In such cases the sponsor's supervisor shall designate the duties to be performed by such WPA superintendents and foremen, except the WPA representative assigned to the project, and shall approve all requests for labor, materials, and equipment.

Where the Work Projects Administration provides general technical supervision of a professional and service type of activity, and the technical supervision

MR. MARSH: I have no further question.

MR. KORNEGAY: No questions.

WITNESS EXCUSED.

- - - - - - - - - -

MRS. KENNEDY: Your Honor, the defendants would like now to introduce our exhibits into evidence.

THE COURT: Which ones?

MRS. KENNEDY: Exhibit 1, Exhibit 2, Exhibits 3, 4, and 5.

MR. KORNEGAY: OBJECTION.

THE COURT: OVERRULED.

(The exhibits previously marked for identification DEFENDANTS' EXHIBITS 1, 2, 3, 4, and 5, introduced in evidence.)

- - - - - - -

MYRTLE D. COBB, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. KENNEDY:

Q Will you state your name and address, please?

A I am Myrtle D. Cobb. I am deputy clerk in the Federal Court in Greensboro.

Q As Deputy Clerk in the Federal Court here in Greensboro, is it part of your duty to keep public records?

A Yes, it is.

Q Do you have a record in the case of Simkins, et al, vs. Gillespie Park Golf Course, et al?

A This is the case. It is all the original papers that went up to the Court of Appeals that was filed in our office.

Q Were the findings of fact part of that record?

A Yes.

MRS. KENNEDY: Your Honor, at this time we'd like to offer into evidence a decree, the findings of fact, conclusions of law and opinion, as rendered by the Judge of the Federal Court, Middle District of Greensboro.

MR. KORNEGAY: OBJECTION.

THE COURT: Do you have anything further that you want to introduce in regard to that?

MRS. KENNEDY: In addition to that, we have the opinion of the Circuit Court of Appeals on this case.

MR. KORNEGAY: OBJECTION.

THE COURT: Let the record show that is being offered in evidence. I will rule on it later.

(The documents referred to were marked for identification DEFENDANTS' EXHIBITS 6 and 7.)

THE COURT: Anything else?

MRS. KENNEDY: Not with this witness, your Honor.